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In The

Supreme Court of the United States

OCTOBER TERM, 1998

OLGA ORISEK,

Petitioner,

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner respectfully presents the following questions which are of national importance in today's economic climate of corporate "downsizing":

Whether an employee, discharged together with other employees who were discharged by the employer because of "downsizing", can successfully make a case of discrimination under TITLE VII and ADEA, and

whether the employer's defense of "downsizing" its operations summarily overrides, as demonstrated in this petitioner's case by the decisions of the courts below, the evidence of discriminatory treatment furnished by the discharged employee under the *McDonnell Douglas* framework prescribed by the Supreme Court, that is to say,

whether, after the discharged employee established her *prima facie* case, the employer's rebuttal, in which the employer proffered the "downsizing" its operations, the alleged specific elimination of the employee's position and the employee's alleged unsatisfactory performance as non-discriminatory reasons for its employment action, will always prevail,

even though the discharged employee in her rebuttal of the employer's non-discriminatory reasons furnished, according to the *McDonnell Douglas* doctrine and proof pattern, overwhelming circumstantial evidence showing that the employer's proffered explanation, as it pertains specifically to this employee's case, is unworthy of credence and was therefore a sham to hide the true discriminatory reasons, and, therefore,

whether the TITLE VII and ADEA statutes are irreparably undermined by such decisions of the courts below.

PARTIES TO THE PROCEEDING BELOW

The parties before this Court are those set forth in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Olga Orisek, petitioner pro se, respectfully petitions for certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in *Olga Orisek v. American Institute of Aeronautics and Astronautics.*

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, dated September 3, 1996, in *Orisek v. American Institute of Aeronautics and Astronautics* is reported at 938 F. Supp. 185, 189 (S.D.N.Y. 1996) and is reprinted in Appendix A at 2a-17a. The order to that effect, filed September 4, 1996, is reprinted in Appendix A at 1a.

The opinion and summary order of the United States Court of Appeals for the Second Circuit, filed September 3, 1998, is reprinted in Appendix B at 18a-21a and is unpublished.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

As the date on which the United States Court of Appeals decided this case was September 3, 1998, this petition is timely filed. No petition for rehearing was filed in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Age Discrimination in Employment Act of 1967, as codified, 29 U.S.C. § 621 - 634 (amended in 1984, 1990, and

by the *Age Discrimination in Employment Amendments of 1986*, Pub. L. No. 99 - 592).

Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. § 2000e to 2000e-17 (amended in 1972, 1978, and by the *Civil Rights Act of 1991*, Pub. L. No. 102 - 166, race, color, gender, religion, national origin).

STATEMENT OF THE CASE

The petitioner, Olga Orisek, alleges that the respondent, American Institute of Aeronautics and Astronautics (AIAA), committed acts of unlawful discrimination based on age, gender and national origin of Orisek when AIAA refused to hire Orisek for the position of Library Manager in May 1991 and when AIAA discharged Orisek almost two years later, in March 1993.

This action for discrimination in employment was initiated in November 1995 following an investigation by EEOC and the issuance of the Notice of the Right to Sue in September 1995. The discovery was completed in mid-1996.

AIAA proffered two principal reasons for Orisek's discharge: The first reason was the alleged elimination of Orisek's position, the position of Operations Computer Support Analyst, that allegedly resulted from a business-justified, Institute-wide reduction in its work force. The second reason was Orisek's alleged unsatisfactory job performance.

Subsequently, the United States District Court for Southern District of New York granted a motion for summary judgment for the defendant. The opinion and the order, entered on September 4, 1996, are reprinted in Appendix A (1a-17a).

The appeal was filed in a timely manner on September 23, 1996. The appeal was subsequently withdrawn without prejudice to reinstatement pending a decision on the motion for reconsideration in the District Court. The motion for reconsideration was denied on August 29, 1997 and the appeal was reinstated on September 25, 1997. (The District Court's one-sentence, handwritten denial is not included here.)

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court in September 1998. The summary order was entered on September 3, 1998 and is reprinted in Appendix B (18a-21a).

Orisek presented the following issues for the review by the Court of Appeals: In its decision and order of summary judgment, the District Court made significant and multiple errors in the interpretation of the law as well as in the interpretation of the available evidence. The following errors have been sufficiently important so that the District Court reached an incorrect decision as a result of these errors:

1. The Court abused its discretion when it denied Orisek's request seeking information about the circumstances under which certain employees protected under TITLE VII and ADEA statutes left AIAA's employ.

2. The Court went awry in interpreting the prima facie case and the shifting of the evidentiary burden under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688 5 FEP 965 (1973), doctrine and proof pattern specified by the Supreme Court for TITLE VII and ADEA cases.

3. The Court erroneously failed to apply the *McDonnell Douglas* test, prescribed by the Supreme Court for TITLE VII and ADEA cases, to the matter of AIAA's refusal to hire Orisek for the position of Library Manager in May 1991.

4. In the matter of the Orisek's discharge by AIAA in May 1993, the Court's refusal to rule on the sufficiency of Orisek's prima facie case notwithstanding, the plaintiff submitted overwhelming circumstantial evidence that sufficiently establishes her prima facie case; just on these grounds, the Court's decision to grant the summary judgment for AIAA is erroneous and should have been reversed as a matter of law.

5. Orisek furnished overwhelming circumstantial evidence, as envisioned by the *McDonnell Douglas* doctrine and proof pattern, showing that AIAA's proffered explanation, as it pertains specifically to Orisek's case, is unworthy of credence and was therefore a sham to hide the true impermissible discriminatory reasons. Orisek showing includes, but is not limited to the following facts:

(i) The first instance of discrimination, the refusal to hire Orisek for the position of the Library Manager, took place twenty two months before the alleged "downsizing".

(ii) Orisek showed that less than one month before Orisek's discharge and the alleged elimination of Orisek's position of Operations Computer Support Analyst, AIAA stated in Orisek's job performance review: "The role as Operations Computer Support Analyst is critical for TID's future"...."Olga, as our Systems Guru"...."this is a critical position within TID".

(iii) Orisek showed that AIAA made an unsuccessful attempt to replace Orisek with an employee from a class of employees not protected under TITLE VII and ADEA.

(iv) Orisek showed that her performance was rated "excellent" (the highest rating) by AIAA for fifteen years, the last six years in the same position - Operations Computer Support Analyst.

(v) AIAA alleged that during the ensuing two years in the same position, Orisek's performance declined by four levels from "excellent" (the highest) to "unsatisfactory" (the lowest).

(vi) AIAA gave Orisek no performance reviews or warnings during the last two years, thus demonstrating a disparate treatment of Orisek in comparison to all other employees whose performance was reviewed regularly on an annual basis.

(vii) Orisek showed that AIAA furnished into evidence a fraudulent job description in its attempt to claim that Orisek's duties had changed and, therefore, that Orisek was not performing her duties as required.

(viii) Orisek furnished a statistical analysis of the AIAA's data, showing, according to the standards prescribed by the Supreme Court, that AIAA systematically discriminated against management employees protected under TITLE VII and ADEA.

All of the above issues are discussed in a more appropriate detail in the Appellant's Brief reprinted in Appendix C (22a-105a) and in the mathematical statistics analysis of AIAA's employment practices reprinted in Appendix D (106a-130a).

REASONS FOR GRANTING THE WRIT

The questions presented for review encompass issues of overwhelming national importance. The American business climate over the last two decades has been characterized by "downsizing", particularly by large companies, in a largely successful attempt to improve their competitiveness. This trend continues in spite of the country's favorable economic conditions.

Under these circumstances, the employers, while pursuing their legitimate business interests, must not be allowed to hide their prejudices and impermissible discriminatory acts under the mantle of "downsizing".

This is a matter of great significance and interest to the citizens of this country. A New York Times article entitled "When Being An Old Hand Becomes A Handicap", which appeared on March 31, 1993, describes several cases of people who were laid off. The article refers to

> "an older worker who traditionally received high job-performance ratings, then begins to get "fair" or "poor" evaluations and finally is discharged, a long-time employee who is no longer invited to staff meetings, the worker who has responsibilities taken away, or an older employee who is transferred to a division where there are likely to be layoffs".

It is striking how closely this newspaper description parallels this petitioner's case, word by word.

Similarly, the magazine The Economist wrote on page 7 of its January 27, 1996 issue:

> "Yet in reviewing the legislation (i.e. ADEA), the American Congress concluded that age discrimination remains an obstacle to employment for older workers, and that 'statutory provisions.....remain incomplete and somewhat ineffective'. Opinion surveys show that 80% of Americans - the same proportion as in Europe - believe that most employers discriminate against older workers. Legislation may merely have made employers more careful to hide their prejudices."

If the employers are allowed to hide their prejudices and impermissible discriminatory acts under the guise of "downsizing" even after confronted with overwhelming circumstantial evidence of their discriminatory actions, the circumstantial evidence specifically envisioned and permitted by the Supreme Court under the *McDonnell Douglas* doctrine and proof pattern, then the TITLE VII and ADEA statutes are unenforceable.

Unfortunately, the sentiment conveyed by the courts below in this petitioner's case confirms just that. For instance, the sole substantive question asked by the appellate panel during the hearing and directed only at the appellee was exactly the following: "There were several layoffs, right?"

This petitioner pro se cannot help herself but to express her disappointment with the cavalier way in which the courts below treated the law and the evidence. Because of the undisputed layoffs, it is as if the courts below did not want to bother with the overwhelming circumstantial evidence of the employer's discriminatory actions. Furthermore, as discussed below, the courts appeared to lack the understanding of the *McDonnell Douglas* doctrine and proof pattern prescribed by the Supreme Court.

Similarly, the District Court in its decision (Appendix A at 7a) quotes *Viola v. Philips Medical Systems (PMSNA)*, 42 F.3d 712, 715-16 (2nd Cir. 1994):

> "Given the minimal requirements for establishing a *prima facie* case of employment discrimination, and the ease with which employers can point to the down-sizing procedure to justify any single termination, these cases (involving individual employee caught up in a reduction-in-force) often turn on whether a plaintiff has established that the rationale offered was a mere pretext for.....discrimination."

Unhappily, the immediately preceding sentence (Appendix A at 7a) of the District Court decision states:

> "I need not reach the question of whether this showing is sufficient to establish a *prima facie* case, however, because I find that, even assuming her circumstantial evidence meets the threshold of sufficiency, she has failed to proffer evidence from

> which a reasonable jury could find that the Institute's asserted reason for the discharge was a pretext for discrimination."

Thus, the District Court refused to rule on the sufficiency of Orisek's prima facie case, which AIAA claimed (Appendix A at 6a) Orisek could not establish. As much as "assuming her circumstantial evidence meets the threshold of sufficiency" does not constitute a ruling on the sufficiency of Orisek's *prima facie* case, the District Court's erroneous refusal to rule on the sufficiency of Orisek's *prima facie* case is of great legal significance in view of the *McDonnell Douglas* doctrine.

Here, the District Court went awry in interpreting the *prima facie* case and the shifting of the evidentiary burden under the *McDonnell Douglas* doctrine and proof pattern. The Supreme Court clarified this matter in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 25 FEP 113, 115 (1981):

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now emerges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly, by persuading the court that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence".

It should have been clear to the District Court that Orisek undertook to do the latter. This matter is discussed in a more appropriate detail in Appendix C at 40a-48a.

Surprisingly then, the Appellate Court erroneously claims

in its decision (Appendix B at 20a) that Orisek was not denied by the District Court the opportunity to establish her *prima facie* case and advances the idea of equating "assuming her circumstantial evidence meets the threshold of sufficiency (of her *prima facie* case)" with the non-existent ruling by the District Court on the sufficiency of Orisek's *prima facie* case. (This erroneous idea was proposed for the first time by AIAA in its reply to Orisek's appellate brief.)

Since, however, the Appellate Court concluded in its decision that the District Court found that Orisek has established her *prima facie* case, then the Appellate Court, by affirming the District Court's summary judgment in favor of AIAA, is in conflict with its earlier decision in the matter of *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2nd Cir. 1990):

> "Because employers rarely have a paper trail - or 'smoking gun' - attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most completely and appropriately made by the trier of the fact. So long as the plaintiff can present 'solid circumstantial evidence' supporting his case, he should have the opportunity to prove his case at trial."

The summary of what constitutes the sufficient circumstantial evidence under the *McDonnell Douglas* according to the previous court decisions can be found in Appendix C at 40a-48a.

This petitioner, Orisek, contends that, according to the standards established by the Supreme Court in *McDonnell Douglas* as well as in view of the court decisions summarized

in Appendix C at 40a-48a, she sufficiently established her *prima facie* case, furnished sufficient circumstantial evidence of AIAA's discriminatory actions and furnished a rebuttal of AIAA's proffered non-discriminatory reasons beyond pale and that, therefore, the decision of the Court of Appeals is in conflict both with its earlier decision in *Hollander* and with the framework established by the Supreme Court for TITLE VII and ADEA cases.

Orisek is a 62 year old woman of foreign national origin who was in AIAA's employ for 17 years. For 15 years, including the last 6 years in the same position - Operations Computer Support Analyst - AIAA judged Orisek's job performance as excellent (the highest rating). During that time, Orisek received regular annual salary increases and was promoted several times.

In May 1991, the month of Orisek's last excellent annual job performance review when Orisek also received her last merit salary increase, Orisek applied for the advertised position of AIAA Library Manager and was rejected by AIAA. During Orisek's tenure with AIAA, she previously successfully worked as Assistant Librarian, supervising the AIAA library during the long illness of the Librarian who was also the Library Manager.

Orisek furnished evidence showing that AIAA hired a 33 year old American male (Appendix C at 50a-51a) as Library Manager, an applicant from a class of employees not protected under TITLE VII and ADEA who did not respond to the advertised job vacancy but was invited for an interview by AIAA, an applicant with only five years of experience, a limited knowledge of AIAA literature and operations, and a limited knowledge of languages and computer applications - all qualifications that were required by the published job vacancy notice. The evidence further shows that AIAA's testimony in

this matter is not worthy of credence (Appendix C at 55a-63a), that Orisek was better qualified than the chosen applicant and that AIAA purposely "relaxed" the requirements of the position in order to hire the less qualified applicant (Appendix C at 64a-69a).

See *Wilburn v. Dial Corp.*, 724 F. Supp. 530, 51 FEP 744 (W.D. Tenn. 1989): "The plaintiff was subject to disparate treatment when the defendant "relaxed" the educational qualifications to promote the white male."

See also *Greer v. University of Arkansas Board of Trustees*, 544 F. Supp. 1085, 33 FEP 77 (E.D. Ark. 1982), *aff'd in pertinent part sub nom. Behlar v. Smith*, 719 F.2d 950, 33 FEP 92 (8th Cir. 1983), *cert. denied*, 466 U.S. 958, 104 S. Ct. 2169, 80 L. Ed. 2d 552, 34 FEP 1096 (1984):

> "The named plaintiff, a tenured professor in the Physical Education department at defendant university, was rejected in her bid for the department chairmanship in favor of a male candidate. The candidate had been chosen even before the existence of a vacancy had been publicized, and he lacked previous experience heading other departments of physical education - the same qualification that plaintiff had been told was the reason she had not been selected. His other qualifications were suspect as well, the principal reason for his having been hired having been that 'he had gone to a high school in California with two swimming pools, that he could probably teach swimming and that he had a nationwide breadth of experience'. The district court found that, because of the contrast between plaintiff's qualifications and those of the individual chosen for chairmanship, plaintiff has been a victim of sex discrimination, and it directed the Board to consider

her and other qualified candidates for the vacancy since created."

As an example (Appendix C at 55a), AIAA engaged in such unsavory deception as submitting into evidence a 15 year old resume of Orisek in an attempt to detract from Orisek's qualification. This resume, which naturally did not include the record of the ensuing 15 years of experience in the AIAA's organization, was written by Orisek by hand in a refugee camp in Europe and was submitted to AIAA with Orisek's application for employment 15 years earlier.

The final reason for granting this petition in connection with the events of May 1991 is the fact that the District Court in its decision (Appendix A at 1a-17a) failed to apply the *McDonnell Douglas* test, prescribed by the Supreme Court, to the matter of Orisek's application for the position of Library Manager. Instead, the District Court engaged in a disjointed discussion of this matter throughout its decision (Appendix A at 1a-17a). The Court of Appeals erroneously concurred (Appendix B at 18a-21a).

But there is more. After Orisek complained for the record (Appendix C at 60a) about the way she was treated by AIAA in connection with her application for the position of Library Manager in May 1991, AIAA immediately retaliated against Orisek. AIAA's actions included the transfer of Orisek, a Computer Operations Support Analyst responsible for AIAA computer-based production system ("our Systems Guru" writes AIAA in Orisek's job performance evaluation as late as February 1993), into a Marketing Department (Appendix C at 84a) that had nothing to do with Orisek's responsibilities, AIAA stopped inviting Orisek to the regular meetings of the management group and excluded Orisek from committees pertaining to computer applications which created many

production problems (Appendix C at 87a).

This is how the sham, that culminated in Orisek's February 1993 unsatisfactory job performance review and Orisek's discharge in March 1993, started in May 1991. Furthermore, AIAA started claiming in its affidavits (Appendix C at 60a-61a) after Orisek started this action, that as early as June 1991, Orisek was taken to task by her supervisor for previously not completing projects on time and not following company procedures. That is to say, after a 15 years long string of excellent annual job performance reviews by AIAA, AIAA claims falsely, after Orisek started this action, that only one month after Orisek's last excellent job performance review Orisek displayed significant deficiencies in her performance both at the time and before her last excellent job performance review. This preposterous claim is refuted by the evidence (Appendix C at 61a-62a).

During the following two years, AIAA gave Orisek no performance reviews or warnings (Appendix C at 71a-73a). This represents a direct evidence of disparate treatment of Orisek by AIAA because other evidence shows that all other employees' performance was reviewed regularly on an annual basis (Appendix C at 72a). The Supreme Court has ruled that the direct evidence of disparate treatment, if strong enough, makes the *McDonnell Douglas* test inapplicable (*Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed.. 2d 523, 36 FEP 977 (1985)) and results in a direct verdict for the plaintiff.

At the end of the two year period in February 1993, Orisek received an unsatisfactory (the lowest rating, four levels below excellent) performance review. Orisek promptly complained about what Orisek perceived to be a general atmosphere of discrimination in the AIAA's organization

against older, foreign-born women. The changes in the composition of the AIAA management employee group after June 1991 (Appendix C at 39a) cannot be characterized in any way other than "American male youth" movement. Orisek complained in a letter to AIAA, dated February 10, 1993, reprinted in Appendix E at 131a-134a. AIAA never discussed this letter with Orisek and proceeded with discharging Orisek three weeks later.

Only after Orisek started this action, AIAA claims in its affidavits that AIAA did not review Orisek's performance for almost two years in order to give Orisek an opportunity to improve. Here, AIAA appears to be falling into its own trap and confirms its disparate treatment of Orisek: By not reviewing Orisek's performance nor giving her a performance warning, AIAA denied Orisek the opportunity to improve (assuming that such improvement was necessary as AIAA started claiming only in February 1993). The evidence shows that such opportunity was given to all other employees either through annual performance reviews or through performance warnings (Appendix C at 72a). See *Vaughn v. Edel,* 918 F.2d 517, 54 FEP 870 (5th Cir. 1990):

> "Neither criticizing Vaughn when her work was unsatisfactory nor counseling her how to improve, Texaco treated Vaughn differently than it did its other contract analysts because, as the magistrate found, she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees."

Among other questionable actions and statements detailed in various portions of Appendix C (22a-105a), AIAA submitted into evidence a fraudulent job description (Appendix C at 83a) in an attempt to show that Orisek's duties had

changed and, therefore, that Orisek was not performing her duties as required. AIAA certified in response to Orisek's interrogatories that said job description, which later turned out to be plainly fraudulent, was used for evaluating Orisek's performance.

Similarly, AIAA cited as one reason for Orisek's unsatisfactory performance Orisek's reliance on an outside contractor - computer programmer. However, the evidence shows that AIAA started this practice in 1982, long before Orisek's appointment to the position of Operations Computer Support Analyst, and has continued this practice to this day, several years after Orisek's discharge (Appendix C at 88a).

In the meantime, the evidence shows that Orisek had significant work accomplishments between May 1991 and February 1993. Among them are (1) Orisek's proposal and implementation of a significant operational improvement which involved a computer automation of microfiche labels with actual realized annual savings of $40,000 to AIAA (Appendix C at 87a-88a), (2) Orisek's proposal and implementation of an optical scanning system which resulted in an almost 40 percent improvement in productivity according to AIAA (Appendix C at 87a-88a), and (3) Orisek's resolution of a well publicized RECON connection with NASA in December 1992 (Appendix C at 67a-68a and 87a-88a), three months before Orisek's discharge.

So much for Orisek's alleged unsatisfactory performance - the first reason proffered by AIAA as a non-discriminatory reason for Orisek's discharge.

The second reason proffered by AIAA for Orisek's discharge - the alleged elimination of Orisek's position - is not credible for the following reasons:

While the layoffs for budgetary reasons are not in dispute, the evidence shows that AIAA's need for an Operations Computer Support Analyst continued after Orisek's discharge and AIAA replaced Orisek with somebody else immediately after Orisek's discharge (Appendix C at 81a-82a). Orisek was the only Operations Computer Support Analyst in the AIAA's organization that relies heavily on the use of computer technology. Among other things, Orisek, in conjunction with an outside programming consultant, designed and implemented the AIAA computerized production system in 1987. This computerized production system was vital to the functioning of the AIAA organization and Orisek was in charge of the system maintenance and the implementation of improvements until she was terminated in March 1993.

The evidence shows that only three weeks before Orisek's discharge, AIAA stated in Orisek's job performance review: "[her] role is critical for TID's future"....."Olga, as our Systems Guru"....."this is a critical position within TID" (Appendix C at 81a).

The evidence further shows that AIAA made an unsuccessful attempt to replace Orisek with a forty-five year old male, who was introduced by AIAA to the outside programming consultant as "a new system analyst that somebody hired" (Appendix C at 82a). In addition, the evidence shows that Orisek was replaced permanently with a forty-seven year old male as a contact with the outside programming consultant (Appendix C at 82a).

Furthermore, the District Court erred in concluding that the statistical data regarding AIAA's employment practices is not statistically significant (Appendix A at 15a). A mathematical statistics analysis presented by Orisek and

reprinted in Appendix D at 106a-130a defeats this District Court's conclusion and shows that the data is statistically significant at the 94 percent and 97 percent level of confidence (Appendix D at 109a-128a and Appendix C at 89a-97a).

In addition, the evidence shows that the data on AIAA's employment practices with respect to AIAA's management employees, presented by Orisek in Appendix C at 36a-40a, is relevant to Orisek's case (Appendix C at 38a). It is so because Orisek applied for the position of Library Manager, a management position, and was rejected by AIAA. Previously, Orisek worked in a management position as AIAA's department head and was promoted to the position of Computer Operations Support Analyst. The data on AIAA's employment practices regarding its management employees is therefore highly relevant to Orisek's case. The District Court erroneously claims (Appendix A at 16a) that Orisek did not submit evidence that these employees "are appropriately grouped as management" and were "similarly situated". As discussed below, the same District Court denied Orisek's request seeking additional information in this matter after AIAA refused to provide such information.

The mathematical statistics analysis in Appendix D (109a-128a) was prepared according to the standards set by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), *Hazelwood School District v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768, 15 FEP 1 (1977) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 396, 14 FEP 1514 (1977).

The concept of statistical significance as related to legal significance and as adopted by the Supreme Court in *Hazelwood* and in *Castaneda* is discussed in Appendix D at

128a-130a.

Both the District Court in its handwritten denial of the motion for reconsideration (not included here) and the Court of Appeals in its opinion (Appendix B at 18a-21a) remain silent about the statistical analysis in Appendix D (109a-128a).

Nevertheless, the mathematical statistics analysis of AIAA's employment practices in Appendix D (109a-128a) shows, according to the standards prescribed by the Supreme Court, that AIAA systematically discriminated against management employees protected under TITLE VII and ADEA.

The final reason for granting this petition lies in the fact that the District Court abused its discretion when its denied Orisek's request for information regarding the circumstances under which certain management employees left AIAA's employ (Appendix C at 36a-40a). This information is clearly relevant to Orisek's case: Orisek applied for the position of Library Manager and was rejected by AIAA, worked in a management position as AIAA's department head and was promoted from the position of the department head to the position of Computer Operations Support Analyst.

The Court of Appeals, in its affirmation of the District Court's decision (Appendix B at 18a-21a), is silent about this matter. The Court of Appeals is therefore in conflict with its earlier decision in *Hollander*:

> "It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving American Cyanamid under unexplained circumstances, which might help prove his claim that American Cyanamid's explanation for his discharge was pretextual."....."we hold the district court's

denial of Hollander's motion to compel an abuse of discretion."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
S. D. OF N.Y.
Filed September 4, 1996

95 CIVIL 9774 (BDP)

JUDGMENT

OLGA ORISEK,

Plaintiff

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Defendants

Defendants having moved for summary judgment and the said motion having come before the Honorable Barrington D. Parker, United States District Judge and the Court thereafter on September 3, 1996, having handed down its memorandum decision and order granting the defendants' motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as to defendants.

Dated: White Plains, N.Y.
September 4, 1996

s/ James M. Parkeson
Clerk

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 CV 9774 (BDP)

MEMORANDUM DECISION AND ORDER

OLGA ORISEK,

Plaintiff

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Defendant

Barrington D. Parker, Jr., U.S.D.J.

BACKGROUND

This action for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, is before this Court on the motion of defendant American Institute of Aeronautics and Astronautics ("the Institute") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Olga Orisek claims the Institute discriminated against her on the basis of age, gender and national origin by terminating her after 17

years of employment. The Institute moves for summary judgment on the grounds that (1) Orisek cannot establish a *prima facie* case of discrimination on the basis of age, gender or national origin, (2) even if Orisek can establish a *prima facie* case, she cannot demonstrate that the Institute's legitimate, non-discriminatory reason for terminating her was pretextual, and (3) compensatory and punitive damages are not available under the ADEA and are limited to $50,000 under Title VII.

Orisek is a 60-year old woman of Czechoslovakian origin. She worked for the Institute in the New York Division from 1976 until she was terminated in 1993, first in a clerical position and finally in the User Services Department in the position of Operations Computer Support Analyst.

The Institute is a non-profit organization. Its New York branch publishes scientific abstracts and technical treatises for the international aviation and aerospace industry. In the mid-1960s, the National Aeronautics and Space Administration ("NASA") formed a partnership with the Institute to create, manage and market a database of scientific information about NASA's aeronautic and space activities. In 1988, NASA signed what would become the Institute's final five-year grant. The grant funded 90% of the Institute's operations and was renewable on a yearly basis.

For fifteen years, through May 1991, Orisek received excellent performance evaluations. In 1987, she was promoted to the position of Operations Computer Support Analyst for the Institute. In 1990, she also worked as Assistant Librarian. In May of 1991, Orisek applied for the position of Library Manager. She was interviewed for the position by the Director of the Institute's New York Division, Barbara Lawrence, but it

was offered to and accepted by David Purdy, a 33-year old American man.

Also in 1991, NASA cut back the Institute's funding and ordered the Institute to close its microfiche department. As a result, seven people were laid off. Forced to reduce costs, the Institute reorganized from a traditional management hierarchy to a lateral system emphasizing cross training, a team approach, and fewer departments. As part of that reorganization, in June of 1991, Orisek was reassigned from the supervision of Irene Bogolubsky, the Institute's Technical Director, to the User Services Department under the direction of Geoff Worton.

In November 1992, the Institute was told that NASA had reduced its 1993 grant from $3.6 million to $3.1 million, and became aware that further cuts in funding would occur. With a view towards reducing the Institute's labor force of 58 plus three vacancies, Lawrence directed her managers to conduct a company-wide peer review of employee work performance, evaluating each individual on the basis of their flexibility, productivity and performance. In February 1993, Worton evaluated each individual in the User Services Department Orisek received the only unsatisfactory evaluation. She and six other employees, one from each department, were terminated in March 1993. Orisek's position of computer Support Analyst was eliminated.

In December 1993, NASA eliminated all funding to the Institute's New York Division, a budget loss of $2.75 million. An additional twenty employees were laid off in a third reduction-in-force at the end of that year. A fourth layoff

occurred in April 1995 as a result of further dwindling funds. The Institute operates today with a staff of less than 20.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment

> "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Court's responsibility is to perform

> "the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *McNeil v. Aquilos,* 831 F. Supp. 1079, 1082 (S.D.N.Y. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1985)); *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F. 2d 118, 121 (2d Cir. 1990).

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw reasonable inferences against moving party. *See McNeil*, 831 F. Supp. at 1082 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curium) (other citations omitted)). *See also Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) (citation omitted).

The standards set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-04 (1973), relating to the burden and order of proof in Title VII cases also apply to cases arising

under the ADEA. *See Pena v. Brattleboro Retreat,* 702 F. 2d 322, 323 (2d Cir. 1983). Under the McDonnell Douglas analysis, the plaintiff must first establish a *prima facie* case of discrimination. Once the plaintiff establishes a *prima facie* case, the defendant must produce evidence that the adverse employment action was taken for legitimate, non-discriminatory reason. After the defendant articulates a legitimate reason for the action, plaintiff may prevail only by showing that the defendant's stated reason was merely a pretext for discrimination, i.e., that it masked the defendant's true discriminatory reason for its action. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

"The burden of establishing a *prima facie* case is a modest one, but it has substance nevertheless." *Viola v. Phelps Medical Sys.*, 42 F. 3d 712, 716 (2d Cir. 1994) (internal quotation and citation omitted). To establish a *prima facie* case of employment discrimination under Title VII and the ADEA, Orisek must show (1) she was a member of a protected group, (2) she was qualified for her job, (3) she was discharged, and (4) the discharge occurred under circumstances giving rise to an inference of discrimination. *See Viola*, 42 F.3d 715-16. There is no dispute that Orisek has shown that she was a member of a protected group and that she was discharged. The Institute argues, however, that Orisek cannot show she was qualified for her job or that she was discharged under circumstances that give rise to an inference of discrimination.

As evidence that she was qualified for the position and she was discharged under circumstances giving rise to an inference of age discrimination, Orisek has offered affidavit describing her work environment following the reorganization in 1991 and the sequence of events surrounding her application for the

position of Library Manager and her termination. She also offers her performance reports, her resume, and portions of former employee depositions. She argues that her qualification for the position from which she was terminated is demonstrated by the fact that she received excellent performance evaluations in job of the same description her previous 15 years of employment. She argues that an inference of discrimination may be drawn from the fact that she received her only unsatisfactory performance evaluation in the 17 years of employment a month before her discharge, that on the same day the Institute announced the reorganization in 1991, it hired and outside applicant, who was a younger, American man, for the position of Library Manager, a position for which Orisek had applied and was qualified, that she heard a former employee and the manager of the Processing and Production Department make disparaging remarks aimed at minorities and foreigners, and that several other older foreign women were terminated while younger American men were retained during the reorganization and reduction-in-force.

I need not reach the question of whether this showing is sufficient to establish a *prima facie* case, however, because find that, even assuming her circumstantial evidence meets the threshold of sufficiency, she has failed to proffer evidence from which a reasonable jury could find that the Institute's asserted reason for the discharge was a pretext for discrimination.

> "Given the minimal requirements for establishing a *prima facie* case of employment discrimination, and the ease with which employers can point to the down-sizing procedure to justify any single termination, these cases [involving and individual employee caught up in a reduction-in-force] often turn on whether a plaintiff has established that the rationale offered was a mere pretext

for .... discrimination." *Viola,* 42 F.3d at 716 (internal quotation and citation omitted).

Assuming that Orisek has established a *prima facie* case, the burden passes to the Institute to proffer a legitimate, non-discriminatory business rationale for dismissing Orisek. The Institute has offered evidence that it implemented a business-justified, Institute-wide reduction in its work force in response to funding cutbacks, that it relied upon non-discriminatory factors in selecting one employee from each department to be fired, and that the individuals selected for termination were reviewed to ensure that, when viewed as a group, the Institute was not inadvertently violating any civil rights laws.

The Institute has proffered evidence that among the eight employees dismissed in March 1993, there were three American men, one under the age of 30 and all under the age of 45. In addition, fourth American man of 34 years of age was dismissed for poor work performance in July 1993. The Institute has also demonstrated that older, foreign, female employees were not terminated disproportionately in any of the several reduction-in-force implemented in 1991, 1993 and 1995. The evidence offered by the Institute shows that several female foreign nationals of the same age as Orisek were retained. Finally, the affidavits of the people who implemented the reduction-in-force support the conclusion that the decision to dismiss Orisek was based upon her unsatisfactory work performance irrespective of age, gender or national origin.

"Once an employer has produced evidence of non-discriminatory rationale for its action, the factual inquiry proceeds to a new level of specificity." *Viola*, 42 F3d. at 717 (internal quotations and citations omitted). "Plaintiff

> retains the ultimate burden of persuasion of proving that intentional discrimination, rather than the explanation offered by the employer was the true reason for the termination. To defeat a properly supported motion for summary judgment, plaintiff must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee's age [, gender or national origin] was the real reason for the discharge." *Viola*, 42 F3d at 717 (internal quotations and citations omitted). Summary judgment is "proper only if the evidence of discriminatory intent is so slight that no rational jury could find in plaintiff's favor." *Viola*, 42 F.3d at 716 (citation omitted).

Orisek attacks the apparently neutral mechanisms implemented by the Institute in selection employees for dismissal on several grounds. First, she argues that her February 1993 performance evaluation was an unjustified criticism made to justify her later firing. Second, she argues that an outside, younger, American male was hired for a position for which she was allegedly more qualified just as the reorganization was beginning revealing the Institute's animus towards older, foreign women. Third, she argues that the Institute's toleration of disparaging remarks directed at minorities and foreigners reveals the Institute's true discriminatory motive. Fourth, she argues that the Institute's reorganization in 1991 had the effect of excluding older foreign women, including herself, from management level positions. Fifth, she argues that the Institute failed to inform her of job vacancies in April of 1995, but mailed notices to other employees who had been laid off.

Appendix A

As to each of these arguments, there is no real factual dispute as to what happened. The only issue is whether they raise a jury issue as to pretext and discriminatory intent. They do not, because all of the events are fully consistent with the conduct of non-discriminatory business affairs, and there is no evidence that casts these events in any other light. The critical omission in Orisek's showing on each of these arguments is the absence of any evidence that the decision to terminate her was motivated by age, gender or national origin. Title VII and the ADEA forbid disparate treatment on the basis of age, gender and national origin, but they may not invoked merely to challenge the wisdom of an employer's decisions. *See Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied,* 459 U.S. 1103 (1983); *Lieberman v. Gant,* 630 F.2d 60, 67 (2d Cir. 1980).

As to the performance evaluation in February 1993, Orisek alleges that it is suspect because it was the first adverse review she had received in 17 years of employment, it was given on the eve of the reduction in force, it was nine month late, and it was unjustified on the merits. The Second Circuit has held, however, that

> "[d] dismissals are often preceded by adverse performance review [and that were a court] to view this pattern as suspect, without more, many employees would be able appeal their personnel evaluations to a jury." *Viola,* 42 F.3d 718.

Although the February 1993 performance evaluation was Orisek's first negative evaluation, it was her first evaluation following the Institute's reorganization and her reassignment to the User Services Department. In relying upon her past performance evaluations, she fails to take into account that she

was working in a different environment for a different manager with different expectations. She concedes in her deposition that while her job description, which included "light programming, " did not change, she was asked to expand her duties. She specifically acknowledges that even before she was reassigned to the User Services Department, Bogolubsky, her supervisor until 1991, wanted her to increase her programming skills to reduce reliance on outside consulting.

In their affidavits, both Lawrence and Worton state that as the complexity of the Institute's demands on the computer system increased, Orisek had difficulty completing and managing her projects and continued to rely on an outside programmer for almost all of her special project assignment. In addition, they both state that Orisek had problems adapting to the reorganized, lateral team approach at the Institute. Their affidavits are confirmed by documentary evidence, including several memoranda, notes from meetings and Orisek's final performance review, indicating that, in their view, Orisek's reliance on an outside consultant, and her failure to complete projects and work effectively in a team environment were continuing problems despite Worton's efforts to assist her in these areas.

In light of the new expectations accompanying the Institute's reorganization, Worton's February 1993 performance evaluation was not necessarily inconsistent with Orisek's past positive reviews. Even if it were, however, such inconsistency does not support a finding of pretext.

> "[A] new manager is allowed to appraise and employee's work according to his or her own expectations, even if those expectations are contrary to a prior manager's expectations." *Beers v. Nynex Material Enters. Co.,*

1992 WL 8299, at *11 (S.D.N.Y. Jan. 13, 1992) (citations omitted).

According to Worton and Lawrence, Orisek did not demonstrate flexibility, initiative and teamwork required of all employees following the reorganization. Thus, although her job description may have remained the same, a different approach was apparently required. Orisek's own disagreement with her employer's perceptions of her job performance does not satisfy her burden of showing that the Institute's proffered justification was a pretext for discrimination. *See Meiri v. Dacon,* 759 F.2d 989, 995 (2d Cir.), *cert. denied,* 474 U.S. 829 (1985); *Arnell v. Pan American,* 1986 WL 11455, at *5 (S.D.N.Y. Oct. 7, 1986) (citations omitted).

As to the Institute's failure to hire Orisek for the position of Library Manger, Orisek alleges that the selection of a younger American man for the position is evidence of the Institute's post-reorganization animus toward older, foreign born women. Although Orisek has submitted some evidence that she was qualified for the position, she has submitted no evidence that either her or Purdy's age, gender or national origin was factor in Purdy's selection. The Institute, on the other hand has submitted the affidavit of Lawrence, who made the hiring decision, Lawrence's notes from applicant interviews, a memorandum written by Lawrence in February 18, 1993 responding to a letter from Orisek dated February 10, 1993, in which Orisek claimed that she was not seriously considered for the position, and the resumes of both Purdy and Orisek.

In her affidavit Lawrence explains that, in her interview, Orisek emphasized library technology, rather than content and the delivery of service, and that Orisek's management approach differed from her own. Lawrence's notes corroborate her

claims. In her notes of the applicant interviews, she listed Orisek among eight other candidates. Next to Orisek's name, Lawrence wrote

> "Knows our operation, focus on automation, not good at teamwork/team leader/project mng, Good at doing, Wants to grow - probably best in a technical role, BL+OO - sometimes don't communicate easily."

Next to Purdy's name, Lawrence wrote

> "interview May 30, Ready for next step, Knowledgeable with our literature, Well liked within NASA, No managerial experience, but ready for growth, Staff here all responded/related well to him, Ty letter -- shows sense of personality and creativity."

In the memorandum, dated February 18, 1993, Lawrence again states that the major reason that Orisek was not selected was her approach to management. She also mentions that Orisek's writing was not acceptable for external communication without heavy editing, but that Purdy had written the library component of a proposal for his prior employer and had submitted a draft journal article for her review. Finally, Purdy's resume suggests that he had at least the minimal qualifications for the job.

Again, although Orisek may have disagreed with Lawrence's choice and believed that she was the most qualified applicant, this Court is not permitted to second-guess the wisdom of Lawrence's selection.

> *See Lieberman,* 630 F.2d at 67 ("Title VII does not require that the candidate whom a court considers most qualified for a particular position be awarded that position; it requires only that the decision among candidates not be discriminatory. When a decision to hire ..... one person rather than another is reasonably attributable to an honest even though partially subjective

> evaluation of their qualifications, no inference of discrimination can be drawn.").

The mere fact, that a younger, American man was selected is not a reasonable basis on which to conclude that Orisek was passed over because her age, gender or national origin. Such speculation, without more, is insufficient to support her claim that the Institute's reorganization or reduction-in-force was pretextual. *See Arnell,* 1986 WL 11455, at *5.

As to the disparaging remarks, Orisek argues that they are characteristic of the discriminatory environment at the Institute following the reorganization in 1991. In her affidavit, Orisek claims that she heard one American male employee in the presence of Worton, Orisek's supervisor, "Go back to Russia!" and that she heard Tony Lenti, Manager of Processing and Production, exclaim "Those foreigners!" and "Those niggers!" In addition, Orisek offered the deposition testimony of another employee, Danny Luce, in which he states that he also heard the American male employee say "Go back to Russia!" and the deposition testimony of another employee, Maria Sellas, stating that she heard Lenti say "Bitch!" but does not know at whom the remark was directed.

There is no evidence, however, that any of these comments were directed at Orisek. Nor is there evidence that the people responsible for the decision to terminate Orisek - Worton and Lawrence - made such remarks or tolerated such remarks. The American male employee that Orisek claimed said "Go back to Russia!" in the presence of Worton was terminated within two months of the incident for poor work performance and for making such comments.

> "Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus. [Plaintiff]

> must demonstrate a nexus exists between these allegedly discriminatory statements and the [defendant's] decision to terminate her." *Cone v. Longmont United Hosp. Ass'n,* 14 F.3d 526, 531 (10th Cir.1994); *accord Santa Manitone v. Ted Bates Advertising,* 1985 WL 2516, at *7 (S.D.N.Y. Sept. 10, 1985) (finding comments by someone other than decision-maker irrelevant).

As to the Institute's reorganization, Orisek argues that she and other older, foreign women were forced out of management positions, presumably to clear the way for later termination. She claims that before 1991, three of the nine management level employees, which included herself, were women, seven were of foreign origin and eight were over 40 years old. She claims that after 1991 the new management group of five employees consisted primarily of younger American men; none was a woman, two were of foreign origin and three were over 40 years old. Orisek's showing in this regard is insufficient, however, for two reasons.

Although a plaintiff may show pretext by presenting demotion statistics, for statistical evidence to be probative, the sample must be large enough to permit an inference that age, gender or national origin was a determinative factor in the employer's decision. *See Haskell v. Kaman Corp.,* 743 F.2d 113, 121, (2d Cir. 1984). The sample here of four demotions out of nine employees is not statistically significant, particularly in light of the reduction-in-force of over two-thirds of the Institute's staff between 1991 and 1995. There is no evidence that older, foreign women were dismissed disproportionately in any of the several waves of terminations or overall.

Moreover, "[s] statistical evidence is significant only if it is trustworthy .... " *Beers,* 1992 WL 8299, at *7. Here, the only evidence supporting Orisek's claims after the reorganizations is the deposition testimony of Bogolubsky, the Institute's Technical Director and Orisek's supervisor until 1991 when she retired, who states that before the reorganization she invited Orisek to meetings of department head and that Orisek, in addition to the department heads of document processing, indexing, abstracting and document analysis reported directly to her. Orisek, however, has not offered any evidence, such as job descriptions, showing that these employees, including herself, are appropriately grouped as management. *See Cone,* 14 F.3d at 532 ("To made a comparison demonstrating discrimination, a plaintiff must show that the employees were similarly situated."). Moreover, she has not offered any evidence that the two other, older, foreign women in alleged management positions - Irene Bogolubsky and Patricia Marshall - were forced out. In her deposition testimony, Bogolubsky states that she took early retirement, and that there was no litigation nor did she have an attorney representing her in connection with her retirement. The only evidence in the record regarding Marshall's departure, (chart prepared by and attached to the affidavit of Shirley Jacobson, the Institute's Director of Human Resources, depicting the names, ages, gender, national origin, date of hire, and the date and reason for departure of all Institute employees between January 1989 through December 1995), indicates that Marshall also retired in May of 1991.

As to the Institute's failure to notify Orisek of job vacancies while notifying other employees, the Institute has proffered uncontradicted evidence that it notified only employees laid off in its third reduction-in-force, because those

terminations were not associated with poor work performance. Orisek was terminated during the second reduction-in-force not only because her position was eliminated but also because of what Instate perceived as her unsatisfactory work performance.

Having reviewed the evidence offered by Orisek, I conclude that the circumstances of her termination were consistent with a broad-based program of downsizing and restructuring, effected according to standards that were related to business need and that did not discriminate against older, female and foreign employees. I also find that Orisek has not met her burden of proffering evidence from which a rational jury could find that the Institute's decision to terminate her was motivated by age, gender or national origin. Accordingly, the Institute's motion for summary judgment is granted, and I need not reach the question of whether Orisek's damage claims are tenable.

In conclusion, defendant's motion for summary judgment is granted. The Clerk of the Court is directed to close the case.

SO ORDERED.

Dated: White Plains, N.Y.
September 3, 1996

s/ Barrington D. Parker, Jr.
U.S.D.J.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Filed September 3, 1998
Carolyn Clark Campbell, Clerk

SDNY/WPNY
95-cv-9774
Parker

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of September one thousand nine hundred and ninety eight.

Present: Hon. Thomas Meskill,
Hon. John M. Walker, Jr.,
Hon. Robert D. Sack
Circuit Judges.

Appendix B

OLGA ORISEK,

Plaintiff -Appellant

v. 96-9350

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Defendant-Appellee

Appearing for Appellant: Olga Orisek, *pro se*
White Plains, NY

Appearing for Appellee: Lynette M. Phillips
Piper & Marbury, L.L.P.
New York, NY

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Parker, *J.*), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is affirmed.

Appendix B

Olga Orisek, *pro se* appeals from a judgment of the United States District Court for the Southern District of New York (Parker, *J.*), which granted the defendant's motion for summary judgment and dismissed her complaint.

On appeal Orisek claims *inter alia* that the district court denied her the opportunity to establish her *prima facie* case and erred in shifting the evidentiary burden under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 US. 792 (1973). We disagree. The district court assumed that Orisek had established a *prima facie* case of discrimination but found, under the correct legal standards, that she could not prove that the defendant's stated reason for adverse employment action was merely a pretext for discrimination. *See Orisek v. American Inst. of Aeronautics And Astronautics*, 938 F. Supp. 185, 189 (S.D.N.Y. 1996).

Orisek also argues that she furnished a sufficient amount of circumstantial evidence to rebut the defendant's proffered non-discriminatory reasons and that there are issues of fact that would lead a rational juror to conclude that she was subjected to discrimination. For substantially the reasons stated by the district court, we agree that Orisek did not meet her burden of proffering evidence from which a rational jury could find that her termination was motivated by age, gender, or national origin discrimination. *Id.* Having reviewed all of the claims *de novo*, we agree with the district court that there were no genuine issues of material fact in dispute and that the defendant was entitled to judgment as a matter of law.

We have carefully considered all of Orisek's other arguments not specifically addressed and for substantially the reasons stated below find them to be without merit. *See*

Appendix B

Orisek, 938 F. Supp. at 185. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:

s/ Lucille Carr
Carolyn Clark Campbell, Clerk
By: Lucille Carr, Deputy Clerk

Appendix C

96-9350

IN THE
UNITED SATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OLGA ORISEK,

Plaintiff - Appellant

v.

AMERICAN INSTITUTE OF AERONAUTICS
AND ASTRONAUTICS,

Defendant - Appellee

BRIEF FOR PRO SE PLAINTIFF - APPELLANT

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Appendix C

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Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

96-9350

OLGA ORISEK,

Plaintiff - Appellant

v.

AMERICAN INSTITUTE OF AERONAUTICS
AND ASTRONAUTICS,

Defendant - Appellee

CORRECTIONS TO APPELLANT'S BRIEF

The following typographical errors were found in the text of the appellant's brief. The corrections are shown in bold, underlined characters:

1. Page 36a, paragraph 4, 2nd sentence:
This error is significant **to** the extent that the denial of the existence of damages under the statutes invalidates the purpose of this action.

2. Page 37a, paragraph 5:
It is therefore respectfully requested that the Court's earlier decision be reversed and the defendant be compelled to provide information and documentation requested by the plaintiff on **February 5, 1996**. A.p. 45

The following references to the portions of the appellant's appendix were inadvertently omitted from the appellant's brief. The inadvertently omitted references, which should be made

part of the appellant's brief. are shown below in bold, underlined characters:

1. Page 40a, paragraph 2, (iii), last sentence:
The plaintiff testified **(A.p. 55)** to the accuracy of these charts in her Affirmation, based on her many years of work experience in the defendant's organization.

2. Page 55a, paragraph 3, first sentence:
First, to support her claim that Purdy was better qualified than the plaintiff, Lawrence (Lawrence's Affidavit, **Item 17 (see A.p. 47) and** Exhibit 11), as incredible as it may be, proffers Purdy's resume **(see A.p. 104, AIAA-001189 shown in Law. Aff., Ex. 11 and Plain. Aff., Ex. 17)** submitted with his employment application in 1991 and offers for comparison the plaintiff's resume **(see A.p. 68 - 69, AIAA-000197 and 000198 shown in Law. Aff., Ex. 11 and Plain. Aff., Ex. 5)** submitted with the plaintiff's employment application in 1976, fifteen years earlier, without the record of the ensuing fifteen years of experience in the defendant's organization.

3. Page 60a, paragraph 1, last sentence:
Most importantly, none of the plaintiff's fifteen successive annual job performance reviews **(Docket Entry 24, Plain. Aff. Ex. 6)** during the period ending May 14, 1991 indicate any deficiency in the plaintiff's writing abilities.

4. Page 61a, paragraph 2, second sentence:
It is contradicted by the evidence, namely fifteen years of plaintiff's excellent job performance reviews, the last of them only one month earlier (**Docket Entry 24,** Plain. Aff., Ex. 6, **see A.p. 50 and A.p. 71 for excerpts**).

5. Page 61a, paragraph 2, first sentence:
After the plaintiff received excellent / very good / above average performance reviews annually for 15 years (Docket Entry 24, Plain. Aff., Ex. 6, **see A.p. 50 and A.p. 71 for**

excerpts), seven of these years as Analyst - Computer Support and as Operations Computer Support Analyst, ...

6. Page 62a, paragraph 2, last sentence:

..... , Lawrence contradicts the evidence with respect to team work and project management, namely the job performance reviews, the last of them only two weeks old (A.p. 50 **and A.p. 71**, Plain. Aff., Ex. 6).

7. Page 65a, paragraph 4, 3rd sentence:

As an AIAA Administrator, Lawrence knew, same as the plaintiff has known from her own personal experience and as a member **(see A.p. 67, Def. Ex. 11 in Plain. Aff., Ex. 19)** of the American Association of Special Libraries, and the Court erroneously ignores ..... .

8. Page 67a, paragraph 1, 3rd sentence:

All these fifteen years **(see A.p. 50, AIAA-000023)**, the plaintiff dealt exclusively with the aerospace literature, also as the defendant's Department Manager managing up to twelve employees, and as an Assistant Librarian, managing the defendant's library during the long periods of Librarian's absence. The plaintiff had also additional three years **(see A.p. 67, Def. Ex. 11)** of TIS experience abroad.

9. Page 68a, 2nd sentence:

The plaintiff incorporates here in their entirety **(see A.p. 109 - 112)** the second and third paragraph in Item 14 starting on page 6 of the plaintiff's affirmation in opposition to defendant's motion for summary judgment.

10. Page 68a, paragraph 3, 1st sentence:

Sixth, in terms of language requirements specified in the job Vacancy Notice, the evidence shows that the plaintiff's qualifications **(see A.p. 67 - 68)** significantly exceeded Purdy's qualifications **(see A.p. 104)** in that the plaintiff had an active knowledge of several foreign languages as compared to Purdy's passive knowledge of foreign languages.

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11. Page 84a, paragraph 2, last sentence:
The plaintiff furnished evidence that she was an excellent performer for fifteen years with the last excellent job performance review dated May 14, 1991 (A.p. 50 **and A.p. 71**, Plain. Aff., Ex. 6)

The plaintiff - appellant prays that the Court will accept these corrections in the interest of the clarity of the appellant's brief.

Dated: November 14, 1997
White Plains, New York

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STATEMENT OF SUBJECT MATTER AND JURISDICTION

This action was brought in the United States District Court for Southern District of New York for discrimination in employment pursuant to Title VII of the Civil Rights Act of 1964, as codified, 42 U.S.C. § 2000e to 2000e-17 (amended in 1972, 1978 and by the Civil Rights Act of 1991, Pub. L. No. 102-166) (race, color, gender, religion, national origin).

In addition, this action was brought for discrimination in employment pursuant to Age Discrimination in Employment Act of 1967, as codified, 29 U.S.C. § 621 - 634 (amended in 1984, 1990, and by the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592.

Jurisdiction is specifically conferred upon the United States District Court by the aforementioned statutes, as well as 28 U.S.C. § 1331, 1343. Jurisdiction may also be appropriate under 42 U.S.C. § 1981, 1983 and 1985(3), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166.

Jurisdiction is conferred upon the United States Court of Appeals for the Second Circuit by the aforementioned statutes, as well as 28 U.S.C. § 1291 (1988 & supp. 1992).

This is an appeal from a final order of summary judgment for the defendant, entered on September 4, 1996.

This appeal was filed in a timely manner on September 23, 1996. The appeal was subsequently withdrawn without prejudice to reinstatement pending a decision on the motion for reconsideration in the District Court. The motion for reconsideration in the District Court pursuant to Rule 60(b) of FRCP was denied on August 29, 1997. The appeal was

reinstated on September 25, 1997.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are as follows: In its decision and order of summary judgment for the defendant, the Court has made significant and multiple errors in the interpretation of the law as well as in the interpretation of the available evidence, as detailed below.

These errors have been sufficiently important so that the Court reached an incorrect decision as a result of these errors.

STATEMENT OF THE CASE

The plaintiff - appellant, Olga Orisek, alleges that the defendant - appellee, American Institute of Aeronautics and Astronautics, committed an act of unlawful discrimination based on age, gender, and national origin of the plaintiff when the defendant refused to hire the plaintiff for the position of Library Manager in May 1991 and when the defendant discharged the plaintiff almost two years later, in March 1993.

This action for discrimination in employment was initiated in November 1995 (see Appendix p. 8, thereafter referred to as A.p. 8). The discovery was completed in mid-1996.

Subsequently, the Court granted a motion for summary judgment for the defendant. The order was entered on September 4, 1996 (see A.p. 23).

The excerpts from the portions of the record relevant to

the issues presented for review and discussed in detail below are specifically included in the appellant's appendix.

ARGUMENT

Summary

The Court abused its discretion when it denied the plaintiff's request seeking information regarding the circumstances under which certain management employees left the defendant's employ. The Court may not make a decision that deprives the plaintiff of the opportunity to prove pretext. Thus, the Court's decision to grant the summary judgment for the defendant is erroneous and must be reversed as a matter of law.

In applying the *McDonnell Douglas* and *Burdine* doctrine and proof pattern, prescribed by the Supreme Court for TITLE VII and ADEA cases, the Court, as some courts in the past, went awry in equating the *prima facie* case with an ultimate finding of fact, thus requiring the plaintiff to furnish evidence beyond the *McDonnell Douglas* framework.

The Court erroneously failed to apply the *McDonnell Douglas* test to the matter of the defendant's refusal to hire the plaintiff for the position of Library Manager in May 1991. In addition, the Court refused to pass judgment on the sufficiency of the plaintiff's *prima facie* case in the matter of the plaintiff's discharge by the defendant in March 1993. In both instances, the plaintiff submitted overwhelming circumstantial evidence that sufficiently establishes the plaintiff's *prima facie* case under the *McDonnell Douglas* and *Burdine f*ramework. As long as the plaintiff proffers sufficient circumstantial evidence that establishes the

plaintiff's *prima facie* case, the plaintiff must have the opportunity to prove the plaintiff's case at trial. Thus, the Court's decision to grant the summary judgment for the defendant is erroneous and must be reversed as a matter of law.

Furthermore, as part of the plaintiff's rebuttal of the defendant's proffered non-discriminatory reasons, the plaintiff furnished a body of circumstantial evidence that cumulatively destroys the credibility of the defendant's proffered non-discriminatory reasons for the defendant's actions. Therefore, under the *McDonnell Douglas* and *Burdine* framework the plaintiff is entitled to a summary judgment in favor of the plaintiff as a matter of law.

The Court erroneously concluded that the statistical data proffered by the plaintiff was not statistically significant. The Court's conclusion is refuted by a mathematical statistics analysis of the data. Similarly, the Court erred in concluding that the general atmosphere of discrimination in the defendant's organization was not relevant to the plaintiff's case.

Finally, the Court misinterpreted the statutes related to the damages under TITLE VII and ADEA claims. This error is significant the extent that the denial of the existence of damages under the statutes invalidates the purpose of this action.

1. The Court abused its discretion when it denied the plaintiff's request seeking information

The plaintiff requested the defendant's documentation regarding the circumstances under which management employees Irene Bogolubsky, Patricia Marshall and Nanu

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Davis, all of foreign origin, all more than 60 years old, two of them female, left the defendant's employ. The defendant objected and the Court denied the request. See Appendix p. 42 thereafter referred to as A.p. 42

It therefore strains this plaintiff's confidence in the Court when, after the plaintiff's request for this specific information was denied, the Court states on page 16 of its decision:

> "Moreover, she [the plaintiff] has not offered any evidence that the two other, older, foreign women in alleged [sic] management positions - Irene Bogolubsky and Patricia Marshall - were forced out."

In addition, the defendant admits and the evidence shows that Bogolubsky and Marshall were management employees (see for instance A.p. 47, Lawrence's Affidavit, page 6 and A.p. 48, Bogolubsky's Deposition, page 5 in Plain. Aff., Ex. 32).

It is therefore respectfully requested that the Court's earlier decision be reversed and the defendant be compelled to provide information and documentation requested by the plaintiff on February 5, 1997. A.p. 45

> "Holding summary judgment 'patently inappropriate' when district court restricts plaintiff's ability to discover evidence necessary to establish disparate treatment *prima facie* case", see *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-63 (9th Cir. 1985),

> "It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving American Cyanamid under unexplained circumstances, which might help prove his claim that American Cyanamid's explanation for his discharge

was pretextual." "..... we hold the district court's denial of Hollander's motion to compel an abuse of discretion." See *Hollander v. American Cyanamid*, 895 F.2d 80 (2nd Cir. 1990).

The Court's denial citing "similarly situated employees" and "appropriately grouped employees" is missing the crux of this action and the logic of plaintiff's allegations. There is a causal relationship between the circumstances of the departure of these management employees and the plaintiff's case:

(1) The subject of this action involves the plaintiff's application in May 1991 for the position of Library Manager - a management position. See A.p. 10 and 12

(2) The plaintiff alleges that management employees Bogolubsky, Marshall and Davis were either forced into early retirement, retirement or were constructively discharged by Lawrence during the two years preceding the reorganization of June 1991. See A.p. 49

(3) The plaintiff was in a management position for several years before she was promoted (A.p. 50, AIAA-000023 in Plain. Aff., Ex. 6) to the position of Analyst - Computer Support and, later, Operations Computer Support Analyst. Factually and logically, the plaintiff could have not been possibly promoted from a management position to a non-management position. Bogolubsky testified (A.p. 51) that she invited the plaintiff to all meetings of department heads. The organizational chart, prepared by the plaintiff is in A.p. 52, Plain. Aff., Ex. 13. This is the chart which the defendant refused (A.p. 53 and 54) to furnish.

(4) The evidence shows (A.p. 55 and 56, Plain. Aff., Item 9) that after the reorganization by Lawrence in June 1991, the composition of the employee group at the director

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and the department manager level changed in the following way:

(i) Females:
From 3 employees (33 %) to none (0 %)
(ii) Foreign national origin:
From 7 employees (78 %) to 2 employees (40 %)
(iii) Over 40 years old:
From 8 employees (89 %) to 3 employees (60 %)
(iv) Over 50 years old:
From 6 employees (67 %) to 1 employees (20 %)

(v) Over 60 years old:
From 4 employees (44 %) to none (0 %)
(vi) Total management employees:
From 9 employees to 5 employees

"It is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help to rebut the employer's purported nondiscriminatory explanation." (See *Hollander v. American Cyanamid).*

This was the result of Lawrence's policies, started before 1991, that cannot be characterized in any way other than "American male youth" movement. The proof of the statistical significance and the legal significance of the data above is in Chapter 5.

(5) The Court is incorrect in calling this evidence "not trustworthy" on page 16 of its decision for the following reasons:

(i) This evidence is based on the documentation provided by the defendant (see A.p. 57 and 58, AIAA-001444 and 001445 in Plain. Aff., Ex 1).

(ii) The defendant refused to provide the related organizational charts (A.p. 53 and 54)

(iii) For that reason only, the plaintiff prepared the organizational charts showing the AIAA Organizational Structure before June 1991 (A.p. 52, Plain. Aff., Ex. 13) and the AIAA Organizational Structure after June 1991 (A.p. 59, Plain. Aff., Ex. 14). The plaintiff testified to the accuracy of these charts in her Affirmation, based on her many years of work experience in the defendant's organization.

(iv) The plaintiff must not be prevented from making her case because of the defendant's refusal to provide these organizational charts. These charts are central to the plaintiff's case. "The court may not issue a ruling that deprive a plaintiff of his or her opportunity to show pretext" (see *Bell v. AT&T*, 946 F.2d 1507, 57 FEP 181 (10th Cir. 1991).

2. The Court went awry in interpreting the *prima facie* case and the shifting of the evidentiary burden under the *McDonnell Douglas* doctrine and proof pattern specified by the Supreme Court for TITLE VII and ADEA cases

The Court, as some courts in the past, went awry in equating the *prima facie* case with an ultimate finding of fact, thus requiring the plaintiff to furnish evidence beyond the *McDonnell Douglas* framework specified by the Supreme Court for TITLE VII and ADEA cases. This error easily occurs particularly in connection with a faulty interpretation of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 25 FEP 113, 115 (1981). The confusion comes from the fact that in

Burdine the Supreme Court substitutes "was rejected under circumstances which give rise to an inference of unlawful discrimination" for the fourth element of the *McDonnell Douglas prima facie* case, i.e. "after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications".

The same error was committed by the Court, as demonstrated by pages 9 and 12 (A.p. 31 and 34) of the Court's decision, as well as by the defendant (cited by the Court on page 5 of its decision). This error is further apparent from the discussion in Chapters 3. and 4. of this brief. The Court specifically errs in insisting that the plaintiff submitted no evidence that either her or Purdy's age, gender or national origin, as applicable, was a factor either (1) in the selection of Purdy for the position of Library Manager in 1991 or (2) in plaintiff's discharge in 1993. This is synonymous with insisting that the plaintiff submitted no direct evidence of discriminatory intent. The Court erroneously infers that the plaintiff should have submitted and was required to submit such evidence.

However, the direct evidence of discriminatory intent is simply unnecessary under the *McDonnell Douglas* circumstantial proof pattern. Moreover, if the direct evidence of discriminatory intent is proffered and is strong enough, the direct evidence of discriminatory intent will make the *McDonnell Douglas* test inapplicable, *Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523, 36 FEP 977, 982 (1985).

> "Because employers rarely have a paper trail - 'smoking gun' - attesting to a discriminatory intent, disparate treatment plaintiffs often must build their

> cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most completely and appropriately made by the trier of the fact. So long as the plaintiff can present 'solid circumstantial evidence' supporting his case, he should have the opportunity to prove his case at trial", see *Hollander.*

First, the Supreme Court, in *Burdine* did not mean to establish a new rule but only modified the proof pattern for those instances where the fourth element of the McDonnell proof pattern - "after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualification" - did not fit the circumstances. This is clear from the fact that the Supreme Court restates the original *McDonnell Douglas* proof pattern in a footnote to *Burdine.*

The Supreme Court, in an attempt to clarify what constitutes a *prima facie* case, after reciting the *McDonnell Douglas* elements, stated in *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978):

> *"McDonnell Douglas* did make clear that a Title VII plaintiff caries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act'..... ."
>
> "We think that the Court of Appeals went awry, however, in apparently equating a *prima facie* showing

under *McDonnell Douglas* with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case....."

"The central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin'. The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A *prima facie* case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."

In a footnote to *Burdine*, the Supreme Court clarified a *prima facie* case further:

"The phrase '*prima facie* case' not only may denote the

establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *9 J. Wigmore, Evidence § 2494 (3d ed. 1940). McDonnell Douglas* should have made it apparent that in the Title VII context we use '*prima facie* case' in the former sense."

And again in *Burdine*

"Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee..... ."

"The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason..... ."

"If the defendant caries this burden of production, the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing the burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext..... ."

"The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the

employment decision. This burden now emerges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly, by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

The *McDonnell Douglas* four part procedure for making the plaintiff's *prima facie* case omits any reference to the employer's intent. This is plainly deliberate, and is dictated by the Court's determination to keep the standards non-subjective and even mechanical. Similarly, it omits any reference to evidence of systematic discrimination by the employer, such as statistics as to past or present imbalance in the composition of the employer's work force. Here again, the omission appears to be deliberate. This is not to say that direct evidence of intent and statistical evidence are irrelevant in these cases; they are simply unnecessary in the first stage, that of building a *prima facie* case of discrimination.

Direct evidence that the particular employment decision arose from a discriminatory motive will always be helpful to a plaintiff's case and, if strong enough, will render any circumstantial showing unnecessary. However, such evidence is usually hard to come by. Employers are, on the whole, too sophisticated to profess their prejudices on paper or before witnesses. The Supreme Court in *McDonnell Douglas*, recognizing the necessity in most instances of reliance on circumstantial evidence, laid down rules of proof under which direct evidence of discriminatory intent is not necessary to the making of a *prima facie* case. As the Supreme Court stated in an ADEA case, "the *McDonnell*

Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination", *Trans World Airlines v. Thurston,* 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523, 36 FEP 977, 982 (1985).

Finally, in order to illustrate the Court's error in interpreting, also with respect to Chapters 3. and 4. of this brief, the requirements of a *prima facie* case in a Title VII and ADEA action, and in particular, to illustrate the circumstances that according to the courts satisfy the fourth element of the *prima facie* case in *Burdine*, i.e. "was rejected under the circumstances which give rise to an inference of discrimination", it is instructive to list the actual showings of a *prima facie* case that were held by the courts to be sufficient in establishing the *prima facie* case:

McDonnell Douglas: The respondent proved his *prima facie* case by showing that

> "(i) he belongs to a racial minority; (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualification. P. 802.

Burdine: In a footnote, the Supreme Court stated:

> "In the instant case, it is not seriously contested that the respondent has proved a *prima facie* case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male, Walz, who had been under her supervision."

Viola v. Philips Medical Systems (PMSNA), 42 F.3d 712, 715-16 (2d Cir. 1994): In the discussion, Jacobs,

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Circuit Judge, states:

"Viola easily established the first three elements of his *prima facie* case. Viola was dismissed at the age of 57, which places him within the protected group under ADEA. He adequately demonstrated his qualifications ..... ."

"As to the final element of his *prima facie* case (evidence which could lead to an inference of age discrimination), Viola offered his performance reports and his sworn deposition in which he chronologically described the events surrounding his dismissal. Viola argues that an inference of age discrimination may be drawn from the following facts: (1) Viola received his only poor performance review in twelve years of employment few months before his discharge; (2) at about the same time that PMSNA decided to implement a reduction in force, the company filled a recently vacant position with a younger employee (Pacowta) rather than leave it vacant; and (3) within a year following Viola's dismissal, PMSNA hired a new employee as a Coordinator Expeditor in a related department..... ."

"We conclude that the circumstantial evidence, little as it is, is more than speculative. See e.g. *Meiri v. Dacon,* 759 F.2d 989 (2d Cir.) (dismissing Title VII claim on the grounds that plaintiff offered only speculative evidence of intentional discrimination), ... Viola's evidence therefore reaches the threshold of sufficiency, particularly in light of Viola's third allegation that his position was replaced by a new

younger employee within one year of his termination."

Hollander v. American Cyanamid Co., 895 F.2d 80 (2nd Cir. 1990): In the discussion, Oakes, Chief Judge, states:

> "The district court correctly found that, for purposes of ruling on the motion for summary judgment, Hollander had established his *prima facie* case. Hollander was fifty-seven years old when discharged, was qualified ....., and his duties were allegedly assigned to two employees, one of whom was eleven years, and the other one year, younger than him."

3. The Court erroneously failed to apply the *McDonnell Douglas* test, prescribed by the Supreme Court for TITLE VII and ADEA cases, to the matter of the defendant's refusal to hire the plaintiff for the position of Library Manager in May 1991

In the discussion section of its decision, the Court has made the following errors:

3.1 The plaintiff easily made out her *prima facie* case

First and foremost, in considering the defendant's refusal to hire the plaintiff for the position of Library Manager in May 1991 on pages 12 through 14 (A.p. 34 - 36) of its decision, the Court makes no distinction between the refusal of the defendant to hire the plaintiff for the position of Library Manager in May 1991 and the discharge of the plaintiff by the defendant in March 1993. These are two separate and distinct events separated by a period of time which is twenty-two months long. The Court failed to recognize that each of these two events separately leads to

the charges of discrimination both under Title VII and ADEA.

Second, the Supreme Court has defined the doctrine and the proof pattern of discrimination under Title VII and ADEA in cases of refusal to hire in its landmark case *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 688, 5 FEP 965 (1973). In order to establish a *prima facie* case of employment discrimination under *McDonnell Douglas* doctrine and proof pattern in cases of refusal to hire, the plaintiff must show:

(i) that the plaintiff belongs to a protected class;

(ii) that the plaintiff applied for and was qualified for a job for which the employer was seeking applicants;

(iii) that, despite the plaintiff's qualifications, the plaintiff was rejected; and

(iv) that, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In its discussion of the defendant's refusal to hire the plaintiff for the position of Library Manager on pages 12 through 14 of its decision, the Court erroneously fails to acknowledge the *McDonnell Douglas* proof pattern nor does the Court rely on a modified proof pattern that has been established by the Supreme Court for proving discrimination in situations other than a direct refusal to hire, such as pool hiring, discharge, refusal to promote, etc.

The Court in fact, in its discussion of the defendant's refusal to hire the plaintiff for the position of Library Manager on pages 12 through 14 (A.p. 34 - 36) of its decision, erroneously ignores the *McDonnell Douglas* doctrine and proof pattern entirely, and, instead, engages in a selective and disjointed discussion of this action without

expressing any opinion about the merits of the plaintiff's *prima facie* case, the defendant's rebuttal and the plaintiff's attack on the veracity of the defendant's rebuttal. On page 12 (A.p. 34) of its decision, the Court again dwells on its earlier (A.p. 31, page 9) erroneous contention, discussed at length in Chapter 2. of this brief, that the plaintiff "submitted no evidence that either her or Purdy's age, gender and national origin was a factor in Purdy's selection". Thus, the Court failed in its duty imposed on it in an individual law suit under Title VII and ADEA.

The failure of the Court to acknowledge the *McDonnell Douglas* doctrine and circumstantial proof pattern is important because, the defendant's claim to the contrary and the Court's silence in this matter notwithstanding, the plaintiff easily made out her *prima facie* case by showing that

(i) She is a member of a protected class of employees (see A.p. 57, AIAA-001445 in Plain. Aff., Ex. 1). The evidence presented by the plaintiff leaves no doubt that the plaintiff was a member of a protected class of employees because of her age, sex and national origin.

(ii) She applied for the position of Library Manager (A.p. 60, AIAA-001382 in Plain. Aff., Ex. 38) and was qualified (compare A.p. 61 - 65, Bogolubsky - director and plaintiff's direct supervisor of many years - Deposition p. 30 through 34 in Plain. Aff. Ex. 22, job vacancy notice A.p. 66, AIAA-000352 in Plain. Aff., Ex. 18, plaintiff's resumes A.p. 67, Pl. Ex. 19 encompassing Defendant's Exhibit 11, and A.p. 68 - 69, AIAA-000197 and 000198 in Plain. Aff., Ex. 5, plaintiff's work history which includes AIAA Assistant Librarian A.p. 47, AIAA-000023 in Plain. Aff., Ex. 6). The defendant does not dispute that the plaintiff applied. Furthermore, no reasonable person can dispute the

fact that the plaintiff was qualified for the position of AIAA Library Manager in light of the testimony of the plaintiff's direct supervisor Bogolubsky, in light of plaintiff's resumes and in light of the plaintiff's work history with AIAA.

(iii) Despite her qualifications, she was rejected. The defendant does not dispute that the plaintiff was rejected.

(iv) After she was rejected, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.

Regarding Item (iv), the plaintiff stated (A.p. 70) in Item 13, page 5 of her affirmation dated June 22, 1996, that "A few days after her last excellent job performance review on May 14, 1991, ... , plaintiff, ... applied for the position of Library Manager". This fact is not disputed by the defendant.

Barbara Lawrence, AIAA-TIS Administrator, who was intimately familiar with the plaintiff's job performance and capabilities as she signed plaintiff's job performance reviews (A.p. 71, AIAA-000027 and other in Plain. Aff., Ex. 6), immediately rejected the plaintiff and the position remained open.

The evidence shows that several days later, on May 24, 1991, Lawrence called David Purdy (A.p. 72 - 73, AIAA-001188 and 001190 in Plain. Aff., Ex. 21), a 33 year old American male who was an outside applicant who did not respond to the advertised opening.

Lawrence invited Purdy for an interview that took place on May 30, 1991 (A.p. 74, AIAA-001383 in Plain. Aff., Ex. 20). Lawrence would have no reason to call Purdy, if Lawrence had not previously rejected the plaintiff. The defendant hired Purdy as admitted by the defendant (A.p. 105).

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The evidence shows that Lawrence had a previous detailed, long-term knowledge of plaintiff's job performance and capabilities. Thus, the interview of the plaintiff by Lawrence on May 31, 1991 (A.p. 75, AIAA-001381 in Plain. Aff., Ex. 38) was merely a formality. The plaintiff was not even invited to fill out an application for the job, unlike Purdy, who was directed to fill out the application for the job on AIAA forms the previous day on May 30, 1991 (A.p. 76 -79, AIAA-001190 through 001193 in Plain. Aff., Ex. 21).

By producing the above evidence, the plaintiff satisfied the requirements of making out a *prima facie* case under the *McDonnell Douglas* proof pattern in the case of refusal to hire. According to the Supreme Court, this is all and there is nothing more the plaintiff has to do to establish her *prima facie* case. Thus, the summary judgment in favor of the defendant is inappropriate and must be reversed as a matter of law. A further discussion of this matter and the *prima facie* case under the *McDonnell Douglas* proof pattern appears in Chapter 2. of this brief.

3.2 The defendant's hypothetical rebuttal

The next step in the *McDonnell Douglas* proof pattern is the defendant's rebuttal. The defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. While the Court erroneously ignores the *McDonnell Douglas* doctrine and proof pattern and thus does not specifically include the defendant's rebuttal in its discussion of the defendant's refusal to hire the plaintiff for the position of Library Manager on pages 12 through 14 (A.p. 34 - 36) of its

decision, one may conclude that the elements of the defendant's hypothetical rebuttal, cited by the Court, are as follows:

(1) The plaintiff incorporates here by reference the following parts of page 12 and page 13 (A.p. 34 - 35) of the Court decision: The last sentence of the second paragraph on page 12 (A.p. 34) and the entire following paragraph that ends on page 13 (A.p. 35).

(2) Other items of significance in Lawrence's notes (A.p. 75, Pl. Aff., Ex. 38), which the Court failed to cite in their entirety in Item (1) above, are as follows: "My experience with Olga as a technician - have built expertise, why want a change? Experience as leader of people - team. Not experienced with NASA Library, customer [illegible]."

(3) Other items of significance in the Lawrence's letter (A.p. 79, Defendant's Exhibit 10), dated February 18, 1993, almost two years after these events took place, which the Court failed to cite in its entirety in Item (1) above, are as follows:

> "....The major reason was her [Orisek's] approach to management. During the interview she expressed a strong desire for a management position. When I asked her why she wanted to become a manager she said that 'I want to be the one to tell other people what to do.' This statement is reflective of her approach, that she is most comfortable in a hierarchical environment, with directions coming from the top ..... .
>
> However, my style is different, and is based on teamwork and consensus. We have worked strenuously in the last few years to delegate responsibility downward, to encourage a matrix-style environment, to

> use project teams to solve problems or develop new approaches, and so forth. I did not feel that Olga was the right person to lead the Library in this environment..... .
>
> Her [Orisek's] supervisor at that time, Irene Bogolubsky, concurred, and was enthusiastic about the person selected [Purdy]."

3.3 The plaintiff's rebuttal

The third step in the *McDonnell Douglas* proof pattern is the plaintiff's burden to show, by preponderance of evidence,

> "either directly that a discriminatory reason more likely than not motivated the employer in making its employment decision or indirectly by showing that the employer's proffered explanation is unworthy of credence", *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207, 25 FEP 113, 115 (1981).

The Court, erroneously, did not concern itself with the *prima facie* case as the means of establishing a legally mandatory, rebuttable presumption of discrimination. Similarly, the Court erroneously ignored all of the plaintiff's rebuttal of the employer's proffered reasons. The only item related to the third step of the *McDonnell Douglas* proof pattern in the Court's decision, to be found on page 13 (A.p. 35), is the plaintiff's alleged disagreement with Lawrence's decision.

However, the plaintiff furnished sufficient evidence that destroys the defendant's proffered non-discriminatory

reasons for selecting Purdy for the position of Library Manager instead of the plaintiff. This evidence was erroneously ignored by the Court:

3.3.1 The evidence shows that the Lawrence's testimony is not trustworthy

The defendant's rebuttal of the plaintiff's *prima facie* case rests solely on an uncorroborated testimony of Lawrence, about two pages of her uncorroborated, handwritten, mostly undated, unsigned notes (See A.p. 60, 74 and 75, AIAA-001381 through 001383 in Plain. Aff., Ex. 38) purported to be the contemporaneous notes and a two-thirds of a page long, typed, unsigned memorandum (A.p. 79, AIAA-001384) that Lawrence allegedly concocted on February 18, 1993, twenty one months after the fact, and only in response to the plaintiff's formal letter of complaint on this and other matters, dated February 10, 1993 (see A.p. 80 - 81, OO-000089 and 000090 in Plain. Aff., Ex. 2). The evidence shows that Lawrence's testimony is untrustworthy and is not worthy of credence:

First, to support her claim that Purdy was better qualified than the plaintiff, Lawrence (Lawrence's Affidavit, Exhibit 11), as incredible as it may be, proffers Purdy's resume submitted with his employment application in 1991 and offers for comparison the plaintiff's resume submitted with the plaintiff's employment application in 1976, fifteen years earlier, without the record of the ensuing fifteen years of experience in the defendant's organization. This plaintiff's resume was hand-written in 1976 shortly after the plaintiff was paroled into the United States as a refugee. Lawrence does this in spite of having multiple versions of an updated

plaintiff's resume that was prepared and included by the defendant in various contract proposals to NASA (see for instance A.p. 67, Plain. Aff., Ex. 19).

This deception could have been perpetrated by Lawrence for no reason other than to maliciously and willfully hide the true extent of plaintiff's qualifications for the position of Library Manager and, thus, to hide the real - discriminatory - motive behind Lawrence's decision to reject the plaintiff.

Second, Lawrence states in her sworn testimony (A.p. 79, Law. Aff., Ex. 10) that "Her [plaintiff's] supervisor at the time, Irene Bogolubsky, concurred, and was enthusiastic about the person [Purdy] selected." It is not so and it is denied by Bogolubsky in her, somewhat hostile to the plaintiff, deposition. See A.p. 82, Bogolubsky's Deposition, page 37: Question: "Do you recollect that you enthusiastically supported the decision of David Purdy or not?" Answer: "I don't recollect anything with that. Ms. Lawrence hired Mr. Purdy, that's all I know." So much for the Lawrence's claim of "management by consensus", A.p. 79, AIAA-001384, Law. Aff., Ex. 10.

Third, Lawrence's sworn testimony (A.p. 83, Law. Aff., p.6) states

> "16. My notes (Exhibit 9, pages 1 and 2) (see A.p. 60 and 75) indicate that Olga's comments emphasized library technology, rather than content and the delivery of service".

Lawrence apparently infers that this was a negative with respect to plaintiff's qualifications for the position of Library Manager. It is not so. Lawrence's notes indicate no such thing and, specifically, do not indicate the "rather than content and the delivery of service" portion of Lawrence's sworn statement.

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Fourth, the veracity of the Lawrence's statement in the previous paragraph is further destroyed by relevant evidence - a one-page document in the Purdy's personnel file (A.p. 84, AIAA-001158) dated September 30, 1992, sixteen months later. This is the Purdy's first annual job performance review written by the Purdy's direct supervisor - Lawrence. Any reasonable person must conclude that this entire document evolves around library technology and automation and reviews Purdy's job performance in these areas.

The significance of this is threefold: (1) It destroys the veracity of Lawrence's statement, (2) it shows the true requirements of the position of Library Manager in light of which (3) the plaintiff was eminently qualified by virtue of her experience in the defendant's organization.

Fifth, Lawrence makes multiple claims about her May 1991 reorganization "from a traditional management hierarchy to a 'lateral' system emphasizing cross training, a team approach and fewer departments" to which, allegedly, the plaintiff had difficulties to adapt. Lawrence appears to be given to buzzwords, management fads and unsubstantiated claims with claimed results absent. Most importantly, the evidence of the pre-1991 organizational structure, see A.p. 85, in AIAA-000242, Plain. Aff., Ex. 3 and the post-1991 organizational structure, see A.p. 86, in AIAA-000243, Plain. Aff., Ex. 4 show no apparent conceptual differences.

In particular, any reasonable person comparing the two charts in AIAA-000242 and AIAA-000243 must conclude that the two organizational structures do not show any change from "hierarchical" to "lateral" structure or a "matrix" structure and, thus, refute Lawrence's claim of a conceptual change in AIAA organizational structure and

therefore also refute Lawrence's claim of the alleged inability of the plaintiff to adapt to the alleged conceptual change. The two charts show that all departments continued reporting to Lawrence "hierarchically" (sic) with a superficial reshuffling of the department names - the previously stand-alone Marketing Department was merged into Business Operations / Technical Support Department and the Processing and Production Departments were united into a new department called Editorial Operations Department.

Similarly, contrary to Lawrence's unsubstantiated claim, the evidence shows that Lawrence did not invent and/or institute working in teams after 1991. The plaintiff, in her many years of experience as Operations Computer Support Analyst, worked constantly in a team setting on many projects that required team work, participation and cooperation from members of various departments in the defendant's organization, various departments of NASA, as well as outside consultants. The notable effort in this area was the design and the installation of the company-wide computerized production systems - a team project that started in 1984, full seven years before 1991 when, as she claims, Lawrence instituted working in teams. The truth of the matter is that none of the major projects the plaintiff worked on during her nine years as Operations Computer Support Analyst was a one-person project and without team work these projects would have never been accomplished. One obvious example is the plaintiff's work in a team with the outside programming consultant, Besore, which is admitted by the defendant as it is at the heart of the defendant's allegations and rebuttal in connection with the plaintiff's discharge in 1993.

Sixth, the plaintiff, who had several years of experience

as a department manager in the defendant's organization, denied (A.p. 87, plaintiff's Rule 3(g) statement, page 5) that she ever expressed her management ambitions in such a simple-minded manner as it is claimed by Lawrence in her memo (A.p. 79, AIAA-001384 in Law. Aff., Ex. 10), dated February 18, 1993, twenty one month after the fact: "I want to be the one to tell others what to do". Lawrence alleges that the plaintiff made this statement during the interview on May 31, 1991.

Curiously, Lawrence's allegation is not corroborated by her purportedly contemporaneous notes (A.p. 60 and 75, AIAA-001381 and 001382 in Plain. Aff., Ex. 38). It is inconceivable that Lawrence would have missed the opportunity to record such a statement by the plaintiff in her purportedly contemporaneous notes of May 31, 1991 - but such a record is nowhere to be found in the Lawrence's notes. Where, then, is this coming from? Remarkably, it appears in Worton's notes from a conversation with the plaintiff on June 20, 1991 (A.p. 88, AIAA-001380, Worton's Affidavit, Exhibit 3), written according to Worton after the fact, three weeks after Lawrence interviewed the plaintiff and after the employment decision was made. Worton wrote: "Have something where I manage what to do". Later, Worton crossed out the word "manage" and replaced it with "tell people what to do".

Thus, the evidence shows that (1) Lawrence and Worton made this story up after the fact and (2) Lawrence's employment decision could have not been possibly made on the basis of this story, contrary to Lawrence's claim, see A.p. 79, in AIAA-001384, Law. Aff., Ex. 10.

Seventh, the plaintiff denied in her Rule 3(g) statement, Item 13(d) (correction: Item 13(d), see A.p. 89, should have

referred to Plain. Aff. Ex. 49, see A.p. 90 - 95) Lawrence's claim (A.p. 79, AIAA-001384, Lawrence's Affidavit, Exhibit 10) that the plaintiff's "writing is not acceptable for external communication without heavy editing". This Lawrence's claim is contradicted by the evidence. The evidence associated with this action is replete with voluminous internal and external reports and proposals written by the plaintiff, the quality of which speaks for itself. The fallacy of Lawrence's claim is obvious: Since both the external and the internal communications written by the plaintiff exhibit the same quality of writing, it is inconceivable that somebody else edited these voluminous writings, including all extensive internal status reports and proposals as well as all the plaintiff's status reports for her own file, for the plaintiff. One of many examples is the plaintiff's proposal, see A.p. 90 - 95, in Plain. Aff., Ex. 49. This plaintiff's proposal was good enough for Lawrence to send it to NASA without any editing under Lawrence's own cover letter - the proposal was promptly approved by NASA without changes. Most importantly, none of the plaintiff's fifteen successive annual job performance reviews during the period ending May 14, 1991 indicate any deficiency in the plaintiff's writing abilities.

Eighth, Lawrence maliciously and willfully retaliated against the plaintiff for not hiding her disappointment (see for instance A.p. 88, AIAA-001380 in Worton's Affidavit, Ex. 3) with the way the plaintiff was treated in connection with this matter. Worton testified (A.p. 96, Worton's Affidavit, page 2):

> "Shortly after the reorganization [and before June 17, 1991 as it is clear from the following paragraph], the Director of the Institute, Barbara Lawrence,

approached me about helping Olga develop her project management skills. Apparently, Olga was having a difficult time bringing project assignments to completion."

This is a blatant, malicious and willful misrepresentation by Lawrence and Worton. It is contradicted by the evidence, namely fifteen years worth of plaintiff's excellent job performance reviews, the last of them only one month earlier (Plain. Aff., Ex 6). It is also indicative of how the sham, that culminated in the plaintiff's discharge in February 1993, twenty one months later, started in May 1991:

After the plaintiff received excellent / very good / above average performance reviews annually for 15 years (Docket Entry 24, Plain. Aff., Ex. 6), seven of these years as Analyst-Computer Support and as Operations Computer Support Analyst, specifically after the last three excellent job performance reviews in 1989, 1990 and 1991 stating "high caliber work" and giving "exceptionally reliable / exceptionally successful" rating to the plaintiff's "reliability in performing work and carrying out orders", "how well did employee work with and for others within company" and "employee's talent for starting action - did employee see things to be done and do them", after the last excellent job performance review was conducted on May 14, 1991 by Irene Bogolubsky and was also signed by Barbara Lawrence, and after none of these job performance reviews indicated the slightest deficiency in the plaintiff's project management skills and in the plaintiff's ability to finish projects on time, only one month later, on June 17, 1991, Lawrence and Worton claim that the plaintiff was having a difficult time bringing project assignments to completion.

This preposterous claim by Lawrence is refuted by the

evidence: Irene Bogolubsky, the plaintiff's supervisor of 15 years until May 14, 1991, denied (A.p. 97, Bogolubsky Deposition, Page 17, Plain. Aff., Ex. 42) that the plaintiff ever had any problems in meeting work deadlines during the period of fifteen years ending May 14, 1991. The evidence therefore shows that Lawrence made it up.

Also, when Lawrence writes about the plaintiff in her undated notes (A.p. 60, AIAA-001382) alleged to be written on May 31, 1991: "Knows our operation; Focus on automation; not good at teamwork/team leader/project mgn, good at doing, wants to grow, probably best in a technical role", Lawrence contradicts the evidence with respect to team work and project management, namely the job performance reviews, the last of them only two weeks old (A.p. 50, Plain. Aff., Ex 6).

Similarly, Worton testified (A.p. 96, Wort. Aff., p. 2) about the meeting on June 17, 1991, only one month after the plaintiff's last excellent job performance review:

> "Some of Mr. Besore's [outside consultant] activities had not been requisitioned by a purchase order, as required by NASA contract. During our early meetings I discussed with Olga the need to create detailed specifications and purchase orders before work or equipment could be ordered, because the Institute could not use NASA funds without proof of a purchase order for the work performed."

This part of Worton's testimony is also refuted by the evidence: Bogolubsky denied (A.p. 97, Bog. Dep., page 17, Plain. Aff., Ex. 42) that the Plaintiff: (1) ever ordered equipment without a supervisor's approval and without a purchase order, (2) ever authorized work by an outside programming consultant, Mr. Besore, without a supervisor's

approval and without a purchase order, (3) ever produced unsatisfactory or unprofessional specifications for the outside programming consultant, Mr. Besore, and (4) ever violated the defendant's procedures and guidelines.

This eliminates all of the reasons proffered by Lawrence, except the matter of applicants' qualifications, as the true reasons for selecting Purdy. Moreover, the only explanation why a rational persons would engage in all these deceptions Lawrence did engage in is to hide the true - discriminatory - reason behind Lawrence's decision.

3.3.2 The evidence shows that the defendant's testimony is not trustworthy

As incredible as it may seem, as part of its rebuttal, the defendant, in the process of making its case, made a number of erroneous and false statements and submitted an unquestionably fraudulent job description (see, in the following order: A.p. 135 - 136, A.p. 138, A.p. 98 - 103) of the plaintiff's position.

More importantly, the plaintiff incorporates here by reference the following parts of the plaintiff's affirmation in opposition to defendant's motion for summary judgment (Docket Entry 24) with references to evidence:

Paragraph 3: Certifiably fraudulent job description, which according to the defendant's own admission, was used in evaluating the plaintiff's job performance (see, in the following order: A.p. 135 - 136, A.p. 138, A.p. 98 - 103).

Paragraphs 4 & 5: Misrepresentation of the defendant's organizational structure, leading to false claims regarding the plaintiff's job performance

Paragraph 7: False accusation that the plaintiff passed

the work of an outside consultant as her own

Paragraph 8: False accusation that the plaintiff attempted to suborn false witness testimony, denied by the witness in her deposition.

3.3.3 The evidence shows that the plaintiff was better qualified for the position of Library Manager than Purdy and the defendant purposely "relaxed" the requirements of the position in order to be able to hire Purdy

The requirements for the position of Library Manager are established by the AIAA/TIS Job Vacancy Notice, dated May 14, 1991, (A.p. 66) in AIAA-000352, Plain. Aff., Ex 18. Purdy's qualifications and his work experience are evidenced by Purdy's resume (A.p. 104) in AIAA-001189, Plain. Aff., Ex. 17. Plaintiff's qualifications and her work experience are evidenced by her resume (A.p. 67) in Plain. Aff., Ex. 19 and the chronology of her employment with AIAA (A.p. 50) in AIAA-000023, Plain. Aff., Ex. 6.

First, the plaintiff's deficiencies, alleged by Lawrence, in the areas of management style, teamwork and technical writing have been refuted and are shown not to be credible in Item 3.3.1 above.

Second, the majority of entries in the sparse Lawrence's notes from Purdy's interview (A.p. 74, Plain. Aff., Ex. 20), consisting of seven incomplete lines of text, purported to bolster Purdy's qualifications and cited by this Court as such, are largely empty phrases consistent with Lawrence's fondness for buzzwords and jargon:

> "Ready for the next step; Well liked within NASA; No management experience, but ready for growth; [mysterious] Ty letter - shows sense of personality and

creativity".

Upon reflecting on these notes, any reasonable person must agree that these notes do not make Purdy qualified for the position of AIAA Library Manager in view of the requirements for this position as evidenced by the Job Vacancy Notice (A.p. 66, AIAA-000352 in Plain. Aff., Ex. 18).

Third, Lawrence claims that she wanted the new Library Manager to know aerospace literature and handle a very demanding subscriber clientele (A.p. 47, Lawrence's Affidavit, page 6). The job Vacancy Notice "requires customer orientation". Lawrence's notes claim "[Purdy to be] knowledgeable with our literature". The defendant further claims (A.p. 105, Defendant's Rule 3(g) statement, Item 19) that

> "The person chosen by Barbara Lawrence to manage AIAA Library, David Purdy, had managed the library of NASA - AIAA's primary source of funds - for the past five years. He was familiar with our literature....".

It is not so. The defendant, AIAA, had a significant contract with NASA. As an AIAA Administrator, Lawrence knew, same as the plaintiff has known from her own personal experience and as a member of the American Association of Special Libraries, and the Court erroneously ignores (see A.p. 106, Plaintiff's Rule 3(g) statement, Item 9), the fact that NASA, a huge organization with huge research centers and libraries, maintains a very nall, insignificant office in New York City where David Purdy managed a small, insignificant library exclusively for this office's internal use and supervised 2 to 3 assistants (see A.p. 104, AIAA-001189 in Plain. Aff., Ex. 17). Totally different

from the defendant's library, this small, insignificant NASA library in New York City does not keep any books on aerospace subjects, is not open to public, does not publish any publications, does not sell to the public, and has no customer service or subscriber clientele (A.p. 106, Plaintiff's Rule 3(g) statement, Paragraph 9).

Furthermore, as an AIAA Administrator, Lawrence knew that this NASA office in New York City dropped aerospace subjects, which are the only subject of defendant's activities and shipped out all pertinent books in the early 1980's, before Purdy was hired in 1986. As an AIAA Administrator, Lawrence knew that since 1986 this NASA office has been involved with Global Warming and Greenhouse Effect and not with aerospace subjects (A.p. 106, Plaintiff's Rule 3(g) statement, Paragraph 9). So inconsequential this very small NASA office in New York City has been to the defendant's activities and the defendant's contract with the NASA's main office that Bogolubsky, the defendant's Director - Technical for several decades ending May, 1991, who was the originator of the contract with NASA decades ago and administered this contract with NASA for decades, testified (A.p. 108, Bogolubsky's Deposition, page 37) that she had never visited the NASA office in New York City.

The Court errs when it concludes on page 14 of its decision that Lawrence's employment decision is a case of "an honest even though partially subjective evaluation of their [applicants'] qualifications". On the contrary, the evidence shows that this is the case of Lawrence knowingly and consciously "relaxing" the qualifications requirements for a less qualified applicant, Purdy, who had only five years of experience in a very small, insignificant NASA library in

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New York City which does not deal with aerospace subjects. Lawrence did this at the expense of the better qualified applicant, the plaintiff. The plaintiff had fifteen years of experience in the defendant's organization, automated AIAA-TIS production and acquisition processes which included the computer link to the NASA main library. All these fifteen years, the plaintiff dealt exclusively with the aerospace literature, also as the defendant's Department Manager managing up to twelve employees, and as an Assistant Librarian, managing the defendant's library during the long periods of Librarian's absence. The plaintiff had also additional three years of TIS experience abroad. See *Wilburn v. Dial Corp.*, 724 F. Supp. 530, 51 FEP 744 (W.D. Tenn. 1989): "The plaintiff was subject to disparate treatment when the defendant "relaxed" the educational qualifications to promote the white male."

Fourth, the evidence also shows that the plaintiff's capabilities and experience in the area of computer automation of AIAA processes including the AIAA Library applications were superior to Purdy's capabilities and experience in those areas.

Purdy's pathetic computer skills are well documented by the RECON affair in December 1992 (see A.p. 109 - 112, Plain. Aff., § 14 and Ex. 16), after Purdy was on the job for eighteen months and had sufficient opportunity to learn necessary skills he had lacked when he was hired. It is significant that Purdy's actions caused the RECON connection, AIAA Library link to the NASA main library, a vital element in the delivery of documents to customers, to go down for two weeks and for two weeks the orders from customers remained unfulfilled. The huge cost of this Purdy's blunder, which was eventually rectified by the

plaintiff on her own initiative and overtime, was never quantified by the defendant. The plaintiff incorporates here in their entirety the second and third paragraph in Item 14 starting on page 6 of the plaintiff's affirmation in opposition to defendant's motion for summary judgment. Item 14 gives a synopsis of the RECON affair.

Fifth, in terms of education, Purdy had an undergraduate degree in religion (1980) and an M.S. in Library Service (1986) (A.p. 104, AIAA-001189 in Plain. Aff., Ex. 17). The evidence (A.p. 67, Defendant's Exhibit 11 included in Plain. Aff., Ex. 19) shows that the plaintiff's education far exceeded Purdy's education, both in scope and in view of the Job Vacancy Notice, as the plaintiff had an undergraduate degree in engineering (1958), an M.A. in Linguistics (Russian and English) (1973), and an M.S. in Library and Information Science (1975).

Sixth, in terms of the language requirements specified in the Job Vacancy Notice, the evidence shows that the plaintiff's qualifications significantly exceeded Purdy's qualifications in that the plaintiff had an active knowledge of several foreign languages as compared to the Purdy's passive knowledge of foreign languages.

See *Greer v. University of Arkansas Board of Trustees*, 544 F. Supp. 1085, 33 FEP 77 (E.D. Ark. 1982), *aff'd in pertinent part sub nom. Behlar v. Smith*, 719 F.2d 950, 33 FEP 92 (8th Cir. 1983), *cert. denied*, 466 U.S. 958, 104 S. Ct. 2169, 80 L. Ed. 2d 552, 34 FEP 1096 (1984):

> "The named plaintiff, a tenured professor in the Physical Education department at defendant university, was rejected in her bid for the department chairmanship in favor of a male candidate. The candidate had been chosen even before the existence of

a vacancy had been publicized, and he lacked previous experience heading other departments of physical education - the same qualification that plaintiff had been told was the reason she had not been selected. His other qualifications were suspect as well, the principal reason for his having been hired having been that 'he had gone to a high school in California with two swimming pools, that he could probably teach swimming and that he had a nationwide breadth of experience'. The district court found that, because of the contrast between plaintiff's qualifications and those of the individual chosen for chairmanship, plaintiff has been a victim of sex discrimination, and it directed the Board to consider her and other qualified candidates for the vacancy since created."

In view of the foregoing, the summary judgment in favor of the defendant is clearly inappropriate and must be reversed as a matter of law. In addition, in view of the evidence, the plaintiff, Orisek, is entitled to a summary judgment in favor of the plaintiff with respect to the defendant's refusal to hire the plaintiff for the position of Library Manager in May 1991, with compensatory and punitive damages as provided for by law.

4. The matter of the plaintiff's discharge by the defendant in February 1993

The Court has made the following errors:

4.1 The Court's refusal to consider the sufficiency of the plaintiff's *prima facie* case notwithstanding, the plaintiff submitted overwhelming circumstantial evidence that

sufficiently establishes her *prima facie* case; just on these grounds, the Court's decision to grant the summary judgment to the defendant is erroneous and must be reversed as a matter of law

The Court finds on pages 5 and 6 of its decision that the plaintiff has shown two elements of her *prima facie* case, namely that (1) she was a member of a protected group and (2) she was discharged. The Court further notes that the defendant argues that the plaintiff cannot show the other two elements of her *prima facie* case, required under the *McDonnell Douglas* and *Burdine* framework, namely that (3) she was qualified to performed her job and (4) she was discharged under the circumstances that give rise to an inference of discrimination.

The Court makes no decision on the merits of the plaintiff's *prima facie* case. Instead, the Court goes directly to the next stage of *McDonnell Douglas* proof pattern - the defendant's rebuttal of the plaintiff's *prima facie* case. The defendant's rebuttal is described in Chapter 4.2 below.

The Court is in error. The plaintiff has proffered sufficient circumstantial evidence to make out her *prima facie* case. The circumstantial evidence is all that is required to prove a *prima facie* case in a Title VII and ADEA action - see Chapter 2. of this brief.

First, with respect to the defendant's allegations, the plaintiff has previously shown that

(i) The evidence shows that Lawrence's and Worton's testimony is not trustworthy (§ 3.3.1 above). Neither Lawrence nor Worton are in the defendant's employ anymore.

(ii) The evidence shows that the defendant's testimony is

not trustworthy (§ 3.3.2 above).

(iii) There is a genuine issue of material fact (Chapter 1. and 5. of this brief) regarding the composition of the employee group at the director and the department manager level before and after the reorganization instituted by Lawrence in June 1991. In June 1991, a previously diverse group of management employees became a group of predominantly young American males; the proportion of females dropped from 33 percent to zero, the proportion of over 60 years old dropped from 44 percent to zero and the proportion of foreign born dropped from 78 percent to 40 percent. The plaintiff has shown (Chapter 1. and 5. of this brief) that this matter is relevant to the plaintiff's action.

(iv) The evidence shows that the defendant in general and Lawrence in particular tolerated inflammatory remarks by management employees which resulted in the general atmosphere of discrimination (Chapter 6. of this brief) starting June 1991. So tolerant was the defendant to these inflammatory remarks that the main perpetrator of this kind of behavior, Tony Lenti, is today the head of the defendant's New York office.

Second, regarding the plaintiff's qualifications for the purposes of her *prima facie* case, the defendant makes an attempt to deny and the Court takes no position on,

(i) The plaintiff furnished the evidence showing that she was an excellent performer for fifteen years, with the last excellent annual job performance review dated May 14, 1991 (A.p. 50, Plain. Aff., Ex. 6).

(ii) After that, the evidence shows no job performance review for the plaintiff for the ensuing twenty-one months (A.p. 113 - 115, Worton's Aff., Ex. 19). The plaintiff received no formal job performance warning during that

period nor was she told informally that her job performance was unsatisfactory or needed improvement. The defendant provides no evidence to the contrary. Other employees did receive such warning in writing when their performance was deemed to be unsatisfactory (A.p. 116 - 117, Luce's Deposition, pages 8 and 9, in Plain. Aff., Ex. 36).

This is a direct evidence of disparate treatment of the plaintiff by the defendant. The defendant is not able to show that the job performance review interval was similarly modified for all employees. On the contrary, the evidence shows (A.p. 118 - 128, Plain. Aff., Ex. 41) that the performance of other employees was reviewed at regular annual intervals as opposed to the plaintiff's twenty-one months. Therefore, other employees, including the employees with unsatisfactory performance were given job performance reviews and performance warnings at regular annual intervals and, therefore, were given the opportunity to improve. Assuming that there was a genuine need for an improvement in the plaintiff's job performance as it is now alleged by the defendant, this opportunity to improve her job performance was demonstrably denied to the plaintiff by the defendant.

> "Neither criticizing Vaughn when her work was unsatisfactory nor counseling her how to improve, Texaco treated Vaughn differently than it did its other contract analysts because, as the magistrate found, she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance, and perhaps her relative ranking, as it did its white employees", see *Vaughn v Edel,* 918 F.2d 517, 54 FEP 870 (5th Cir. 1990).

(iii) The evidence shows that the next plaintiff's job

performance review took place only in February 1993, twenty-one months after the previous job performance review. The plaintiff received an unsatisfactory job performance rating, the lowest performance rating which is four grades below the highest rating she regularly received during the previous fifteen years (A.p. 113 - 115, Worton's Aff., Ex. 19). The plaintiff complained about this job performance review in a letter to the defendant dated February 10, 1993 (A.p. 80, Plain. Aff., Ex. 2). Two weeks later the plaintiff was discharged.

(iv) There is a genuine issue of material fact regarding the circumstances of the plaintiff's last and the only unsatisfactory job performance review in February 1993, the circumstances of the alleged severe decline of the plaintiff's job performance by four grades from the highest to the lowest grade, the circumstances of the twenty-one months period between the last two job performance reviews and no job performance warning during that period.

> "Dismissals are often preceded by adverse performance reviews. Were we to view this pattern as suspect, without more, many employees would be able to appeal their personnel evaluations to a jury. ..... The September 1990 review was Viola's first negative evaluation; but it was only one step down from his prior performance level", see *Viola.*

In the instant (plaintiff's) case however, there is much more plus the plaintiff's performance allegedly dropped not by one level but by four levels between the last two job performance reviews, from the highest to the lowest level.

(v) There is a genuine issue of material fact regarding the question why the plaintiff, the only Operations Computer Support Analyst in the defendant' organization, who was

performing the duties of her job for the previous seven years in an excellent manner, would not be qualified to perform her job, a job for which she was already hired, i.e. would not satisfy even the minimum requirements of the position.

> "The court stated that a plaintiff is only required to show, as part of his *prima facie* case, that his qualifications are similar to those of the entire pool from which applications are welcome, rather than those who are eventually selected", see *Mitchell v. Baldridge,* 759 F.2d 80, 37 FEP 689 (D.C. Cir. 1985).

(vi) There is a genuine issue of material fact regarding the legitimacy of the defendant's claims of "increased complexity of the Institute's demands on its computer system" (A.p. 129, Lawrence's Affidavit, page 5), to which the plaintiff had allegedly difficulties to adapt, in an environment where the defendant's organization was not growing or expanding but, on the contrary, was winding down and was going out of business because of cuts in NASA funding.

Similarly, there is a genuine issue of material fact regarding the legitimacy of the plaintiff's first ever negative job performance evaluation in February 1993, the plaintiff's alleged failure to take into account that she was working in a different environment for a different manager with different expectation (see Chapter 4.2 below), and the legitimacy of these expectations.

> "To establish the qualifications element of her *prima facie* case, the plaintiff presented evidence of satisfactory performance evaluations by two prior supervisors. The court stated that the fact that these varied with the assessment of the defendant supervisor,

> who terminated the plaintiff, raised questions regarding whether the plaintiff's performance had actually deteriorated, or whether the new supervisor had higher expectations and, if so, they were legitimate. Because the plaintiff provided no evidence addressing the answers to these questions, the court held that she failed to prove she was qualified and thus failed to establish a *prima facie* case." See *Triplett v. Electronic Data Sys.*, 710 F. Supp. 667, 50 FEP 1858 (W.D. Mich. 1989), *aff'd*, 900 F.2d 260, 53 FEP 1744 (6th Cir. 1990).

Plaintiff's answers to these questions are in Chapter 4.3.2 of this brief.

Third, regarding the circumstances that give rise to an inference of discrimination, the defendant makes an attempt to deny and the Court takes no position on,

(i) The evidence shows that the defendant made an attempt to unsuccessfully replace the plaintiff with Igor Vesler, a forty-five years old male (A.p. 57, AIAA-001444 in Plain. Aff., Ex. 1). After the plaintiff's discharge, Lawrence introduced Vesler to Besore, an outside programming consultant, as "a new system analyst that somebody hired" (A.p. 133, Besore's Deposition, page 13, in Plain. Aff., Ex 46).

(ii) The evidence shows that the plaintiff was permanently replaced by Tom Cheung, a forty-seven years old male (A.p. 57, AIAA-001444 in Plain. Aff., Ex. 1), as a contact with the outside programming consultant, Besore (A.p. 134, Besore's Deposition, page 12, in Plain. Aff., Ex. 46).

(iii) The evidence shows that in spite of the defendant's claim of eliminating the plaintiff's position, only three weeks

before the plaintiff's discharge, Worton, the plaintiff's direct supervisor, wrote in the plaintiff's job performance review about the plaintiff's position of Operations Computer Support Analyst: "This is a critical position within TID [i.e. within the defendant's organization]" (A.p. 130, Worton's Affid., Ex. 19, page 4).

> "The *prima facie* case may be established 'without proving that [the] job was filled by a person not possessing the protected attribute.' The employee may simply show that the employer had a continued need for someone to do the same work as the discharged employee." See *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 52 FEP 1444 (1st Cir. 1990).

(iv) There is a genuine issue of material fact regarding the possibility that the plaintiff's February 1993 unsatisfactory job performance review, drafted by Worton in November 1992 (see A.p. 113 - 115, AIAA-001245 in Worton's Affidavit, Ex. 19), was made unsatisfactory by Lawrence and Worton in order to justify the layoffs in March 1993 based on the fact that the NASA budget cuts were known to the management in November 1992 (A.p. 131, Lawrence's Affidavit, Par 27).

(v) The evidence shows that in spite of the defendant's unsubstantiated claim (see Chapter 4.2 below) of the alleged plaintiff's failure to fulfill the requirement to take over the computer programming duties from the outside consultant, Besore, the defendant has been operating in the same manner before and after the plaintiff's discharge, using the outside programming consultant, Besore, from 1982 to this day (A.p. 132, Besore's Deposition, page 6, in Plain. Aff., Ex. 11) and merely replaced the plaintiff by Cheung as Besore's contact.

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That is to say that after the plaintiff's discharge, alleged to be in part based on the alleged plaintiff's inability to "wean" herself from the services of the outside consultant, the defendant has clearly not been able to "wean" itself from the services of the outside programming consultant to this day, four years later, and merely replaced the plaintiff with somebody else.

Fourth, the foregoing is sufficient to make out the plaintiff's *prima facie* case. It is worth noting, that a direct evidence of the defendant's discriminatory intent is neither required nor necessary at this stage to prove the *prima facie* case under the *McDonnell Douglas* doctrine and proof pattern - see Chapter 2. of this brief.

Just on these grounds, because the circumstantial evidence in this case is overwhelming, this Court's decision to grant the summary judgment to the defendant is erroneous and must be reversed as a matter of law.

> "Because employers rarely have a paper trail - or "smoking gun" - attesting to a discriminatory intent, disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most completely and appropriately made by the trier of the fact. So long as the plaintiff can present 'solid circumstantial evidence' supporting his case, he should have the opportunity to prove his case at trial," see *Hollander*.

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4.2 The defendant's rebuttal of the plaintiff's *prima facie* case

In the second step of the *McDonnell Douglas* proof pattern, the defendant proffered the following reasons for the plaintiff's discharge:

(1) The plaintiff's position of Operations Computer Support Analyst was eliminated (summarized on p. 7, A.p. 29, of the Court's decision). The defendant implemented a business-justified, Institute-wide reduction in its work force in response to NASA funding cutbacks. The defendant relied upon non-discriminatory factors in selecting one employee from each department to be fired, and that the individuals selected for termination were reviewed to ensure that, when viewed as a group, the Institute was not inadvertently violating any civil rights laws.

(2) The plaintiff was selected for termination because she was the only employee in her department with an unsatisfactory job performance evaluation (summarized on p. 17, A.p. 39, of the Court's decision). The defendant gives the following reasons for the plaintiff's unsatisfactory job performance evaluation (summarized on p. 10 and 11 of Court's decision):

(i) Although the February 1993 performance evaluation was the plaintiff's first negative evaluation, it was her first evaluation following the Institute's reorganization and her assignment to User Services Department. She was working in a different environment for a different manager with different expectations.

(ii) As the complexity of the Institute's demands on the computer system increased, the plaintiff had difficulty completing and managing her projects.

(iii) The plaintiff continued to rely on an outside programmer for almost all of her special projects assignments instead of taking on the computer programming duties.

(iv) The plaintiff had problems adapting to the reorganized, "lateral team approach" at the Institute.

(v) These problems continued despite Worton's (direct supervisor) efforts to assist the plaintiff in these areas.

(vi) The plaintiff did not demonstrate the flexibility, initiative and teamwork required of all employees following the reorganization.

4.3 The plaintiff's rebuttal of the defendant's non-discriminatory reasons

The Court finds on pages 6 and 7 (A.p. 28 - 29) of its decision that, even assuming that the plaintiff's circumstantial evidence meets the threshold of sufficiency, that the plaintiff

> "failed to proffer evidence from which a reasonable jury could find that the Institute's [defendant's] asserted reason for the discharge was a pretext for discrimination".

The Court granted a summary judgment in favor of the defendant.

The Court's finding is erroneous. The plaintiff observes that the Court gives a complete credence to the defendant's reasons and dismisses the plaintiff's rebuttal as "insufficient". The Second Circuit writes in *Viola:*

> "We review a district court's grant of summary judgment de novo, viewing the evidence 'in light most favorable ..... to the non-moving party, and draw[ing]

all reasonable inferences in his favor'".

The Court specifically omits from its discussion specific items of the plaintiff's rebuttal, supported by evidence obtained from the defendant during the discovery. These items are enumerated in the plaintiff's affirmation in opposition to the defendant's motion for summary judgment and are recounted below in Chapter 4.3.1 and 4.3.2.

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now emerges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly, by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer' proffered explanation is unworthy of credence", see *Burdine*.
>
> "..... Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race", see *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978).

The following discussion supported by the evidence will destroy the defendant's proffered reasons for the plaintiff's discharge and will therefore show that the reasons given by the defendant are not worthy of credence, are not legitimate and non-discriminatory, but were pretextual, that is, a sham

to cover the impermissible discriminatory motivation:

4.3.1 The first reason proffered by the defendant for the plaintiff's discharge, namely the elimination of the plaintiff's position of Operations Computer Support Analyst, that allegedly resulted from the business-justified, Institute-wide reduction in its work force, is not credible

This is because the need for an Operations Computer Support Analyst continued and the defendant replaced the plaintiff with somebody else immediately after the plaintiff's discharge. The evidence shows that the Institute-wide reduction in work force cited by the defendant was merely a pretext to conceal the real, impermissible and discriminatory reasons for terminating the plaintiff:

(i) While the Institute-wide reduction in work force is not in dispute, the evidence also shows that only three weeks before the plaintiff's discharge, the plaintiff's direct supervisor, Worton, wrote in the plaintiff's performance review: "This is a critical position within TID [i.e. within the defendant's organization]" (A.p. 130, Worton's Deposition, Ex. 19, page 4).

The plaintiff was the only Operations Computer Support Analyst in the defendant's organization that relies heavily on the use of computer technology. Among other things, the plaintiff, in conjunction with the outside programming consultant Besore, designed and implemented the AIAA computerized production system in 1987. This computerized production system was vital to the functioning of the defendant's organization and the plaintiff was in charge of the system maintenance and the implementation of

improvements until she was terminated in March 1993.

(ii) The evidence shows that the defendant made an unsuccessful attempt to replace the plaintiff with Igor Vessler, a forty-five years old male (A.p. 57, AIAA-001444 in Plain. Aff., Ex. 1). After the plaintiff's discharge, Lawrence introduced Vessler to Besore as "a new system analyst that somebody hired" (A.p. 133, Besore's Deposition, page 13, in Plain. Aff., Ex. 46).

(iii) The evidence shows that the plaintiff was permanently replaced by Tom Cheung, a forty-seven years old male (A.p. 57, AIAA-001444 in Plain. Aff., Ex. 1), as a contact with the outside programming consultant, Besore (A.p. 134, Besore's Deposition, page 12, in Plain. Aff., Ex. 46).

4.3.2 The second reason proffered by the defendant for the plaintiff's discharge, namely the plaintiff's alleged unsatisfactory job performance and the February 1993 unsatisfactory job performance evaluation, is not tenable

(1) The defendant relies exclusively on the affidavits of Lawrence and Worton. The evidence shows that the Lawrence's and Worton's testimony is not trustworthy (Chapter 3.3.1 of this brief). The evidence shows that Lawrence misrepresented the plaintiff's resume, misrepresented Bogolubsky's reaction to the hiring of Purdy, misrepresented the plaintiff's and Purdy's qualifications, made unsubstantiated claims regarding the extent and the character of the reorganization in May 1991, together with Worton misrepresented the plaintiff's statements regarding the plaintiff's management ambitions, misrepresented the plaintiff's writing abilities, and maliciously and willfully

retaliated against the plaintiff for not hiding her disappointment with the way the plaintiff was treated by Lawrence. See Chapter 3.3.1 of this brief for details.

Significantly, the evidence also shows that only one month after the plaintiff's last excellent job performance review, signed by Bogolubsky and Lawrence, Lawrence and Worton falsely claimed that the plaintiff had a history of not completing projects on time, was not good at teamwork / team leader / project management, requisitioned work from the outside programming consultant, Besore, and provided unprofessional specifications for the outside programming consultant. This was denied by Bogolubsky, the plaintiff's direct supervisor of fifteen years until the time of the plaintiff's last excellent job performance review, who contradicted Lawrence and Worton in her deposition. See Chapter 3.3.1 of this brief for details.

(2) The evidence shows that the defendant is not trustworthy (Chapter 3.3.2 of this brief). During the discovery, the defendant produced a fraudulent job description which, according to the defendant's own admission, was used in evaluating the plaintiff's performance. This fraudulent job description (see in the following order: A.p. 135 - 136, A.p. 138, A.p. 98 - 103) was made to support the defendant's rebuttal relative to the plaintiff's computer programming duties. See Chapter 3.3.2 of this brief for details. The Court has consistently and erroneously ignored this fraudulent job description.

The defendant misrepresented the defendant's own organizational structure which led to the defendant's false claims regarding the plaintiff's performance. The defendant made false accusations that the plaintiff passed the work of an outside consultant as her own. Finally, during this action,

the defendant falsely accused the plaintiff of attempting to "suborn false witness testimony", which was denied by the witness in her deposition. See Chapter 3.3.2 for details.

(3) Worton, the plaintiff's manager since June 1991 and the author of the plaintiff's only unsatisfactory job performance review dated February 1993, who allegedly had justifiable higher job performance expectations, was an apparent dilettante in the areas of computer automation of the defendant's activities unlike the plaintiff, who worked in these areas very successfully since at least 1987. The plaintiff furnished evidence that she was an excellent performer for fifteen years with the last excellent job performance review dated May 14, 1991 (A.p. 50, Plain. Aff., Ex. 6).

Worton was not qualified to judge the plaintiff's performance as an Operations Computer Support Analyst and his allegedly higher job performance expectations have no basis in the evidence. By his own admission, Worton was a Director of Marketing until 1991 (A.p. 96, Worton's Aff., § 4). However, Worton, in an apparent attempt to buttress his qualifications, falsely claims (A.p. 96, Worton's Aff., Par 4) that "when the Institute was reorganized [i.e. in June 1991], Olga [i.e. the plaintiff] joined the User Services department, under my direct supervision". This is contradicted by the document (see A.p. 138) AIAA-000236 in Plain. Aff., Ex 12 which states: "In January 1992, TIS (i.e. the defendant) employed a total of 69 employees. User Services did not [yet] exist at this point in time". The Court has consistently and erroneously ignored this evidence.

Worton, unlike the plaintiff, had no previous experience with computer automation of the plaintiff's production system and operations and did not contribute to computer automation activities in any meaningful way. An example is

the plaintiff's letter to NASA, dated as late as December 1992, (see A.p. 139) in Plain. Aff., Ex 25, with a handwritten comment by Worton: "What do you mean by this sentence?" Only the person lacking familiarity with the defendant's operations, namely Worton, could have written such a comment. This letter was a routine, two sentences long communication between the plaintiff and NASA, a communication well understood by both parties.

(4) Regarding the alleged plaintiff's difficulties in completing and managing projects after June 1991, Worton's alleged efforts to assist the plaintiff in these areas, the efforts which Worton claims at various points in his affidavit and which the Court has taken at a face value, are equally suspect. Perhaps the most telling with respect to Worton's project management capabilities is Worton's job performance review dated May 1993 (see A.p. 140, AIAA-001200). This job performance review on page 3 criticizes Worton for "not been able to bring projects to completion" during the last twelve months since his previous job performance review.

(5) Finally, Worton's notes from meetings with the plaintiff have, contrary to the Court's erroneous belief, no probative value with respect to the quality of the plaintiff's job performance. These notes were prepared in the regular course of business. If anything can be gleaned from them then it is only the fact that, unlike with menial or mechanical tasks, the implementation and the completion of large computer automation projects cannot be accomplished by a management decree as Lawrence found out when she made her fatally flawed decision to give a prototype Thesaurus system to the indexing staff as if it were a production system - with predictably disastrous results (A.p. 141 - 142, Plain. Aff., Par 16).

(6) Similarly, Lawrence initiated the flawed publication of J & S Topics (Japanese & Soviet Topics). Before this project failed and was aborted, it resulted in tens of thousands of dollars in losses to the defendant. This was characterized by Lawrence as "good experience" (A.p. 70, Plain. Aff., § 12).

Lawrence also suggested a fatally flawed implementation of CUADRA STAR database system, which per Lawrence's orders replaced, after the plaintiff's discharge, the production system implemented by the plaintiff in the second half of the 1980's. The evidence shows that as far back as September 1991 Worton asked the plaintiff whether CUADRA STAR was usable in the defendant's operations and the plaintiff said "probably not" (see A.p. 143, AIAA-001264 in Worton's Affidavit, Ex. 4).

The point here is that the CUADRA STAR was implemented anyhow per Lawrence's orders after the plaintiff's discharge in 1993. However, CUADRA STAR database system crashed and some computer files were lost. CUADRA STAR was subsequently abandoned by the defendant as unworkable and, with significant additional costs to the defendant, the defendant went back to the original production system implemented by the plaintiff (see A.p. 144, Besore's Deposition, page 21, in Plain. Aff., Ex. 43). Thus, the course of the events vindicated the plaintiff, alas only after her discharge.

(7) The real significance of the events recounted in item (6) above is as follows: Whenever a situation like the one regarding the inception of projects such as J & S Topics or CUADRA STAR or Internet, etc. developed and the plaintiff was asked to express her professional opinion regarding the applicability and usefulness to the defendant's organization,

and if the plaintiff's professional opinion did not agree with Lawrence's intentions, Lawrence's hostility toward the plaintiff grew and Worton, the dilettante in these matters, obliged Lawrence by emulating Lawrence's behavior toward the plaintiff. Furthermore, Lawrence retaliated by demoting the plaintiff and assigning the plaintiff, an Operations Computer Support Analyst, to the Marketing Department under the direction of Worton, a department that had nothing to do with company-wide computer automation.

While the plaintiff retained the same title, salary and job description, unlike until June 1991, the plaintiff was no longer invited to the meetings of the management group and was excluded from many committees that were related to the computer automation of the defendant's activities. This created many problems because the plaintiff continued being responsible for the company-wide computer based production system.

These events, recounted with evidence (see A.p. 109) in Plain. Aff., § 14 and (see A.p. 145) in Plaintiff's Rule 3(g) statement, § 7, which constitute a constructive discharge of the plaintiff by the defendant starting June 1991, have been erroneously ignored by the Court.

(8) In spite of these circumstances, the plaintiff had significant work accomplishments. Among other things, the plaintiff suggested and implemented a significant operational improvement involving a computer automation of microfiche labels to eliminate manual intervention. This system resulted in actual realized annual savings of $40,000 to the defendant, verified by Worton and Miller (see A.p. 146, Plain. Aff., Ex. 28, AIAA-000144).

Similarly, the plaintiff resolved the well publicized problem (Chapter 3.3.3 of this brief) with the RECON

connection to NASA, which is described in detail (see A.p. 109) in Plain. Aff., § 14 and (see A.p. 111) Ex. 16.

Also, the plaintiff proposed and implemented an optical scanning system which resulted in an almost 40 percent improvement in productivity according to Lawrence (see A.p. 147 - 149, Besore's Deposition, pages 11, 12 and 24 in Plain. Aff., Ex. 27).

(9) The Court completely misunderstood on page 10 (A.p. 32) of its decision the Bogolubsky's deposition (A.p. 150 - 151), page 42 and 43, in Phillip's Aff., Ex. 3. The point here is the one captured in Plaintiff's Rule 3(g) statement (A.p. 145): The plaintiff's excellent job performance review dated April 1989 (see A.p. 71, Plain. Aff., Ex. 6) established a specific job performance goal which required the plaintiff to "increase her programming skills to reduce reliance on outside help". As it is clear from Bogolubsky's deposition, Bogolubsky and the plaintiff took a computer programming course at New York University to fulfill this goal. Plaintiff's two subsequent, excellent job performance reviews in 1990 and 1991 do not indicate any deficiency on the part of the plaintiff in this area. Thus, contrary to the Court's understanding, the plaintiff did fulfill her job performance goal, established in 1989, to increase her programming skills.

This issue is related to the alleged requirement for the plaintiff to "wean" herself from the services of the outside programmer. The fallacy of this allegation is evident from the fact that the defendant has been using the services of the same outside programming consultant, Besore, continually, without interruption and in the same manner from 1982, was not able to "wean" itself from the services of the outside programmer to this day (see A.p. 152 - 153, Besore's

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Deposition, pages 6 and 7, in Plain. Aff., Ex. 11), four years after allegedly discharging the defendant in part for this reason, and merely replaced the defendant by somebody else (see A.p. 133, 134, 144, 153, Bes. Dep. in Plain. Aff., Ex. 46).

(10) Chapter 3.3.1 of this brief describes the evidence showing how the sham regarding the alleged plaintiff's unsatisfactory performance, that resulted in the plaintiff's discharge by the defendant in March 1993, started in June 1991.

(11) Chapters 1. and 5. of this brief detail the statistical significance and the legal significance of the statistical data, erroneously rejected by the Court, indicating that the number of older, foreign-born, female management employees in the defendant's organization was drastically reduced in June 1991 as a result of Lawrence's policies started before 1991 that cannot be viewed in any way other than "American male youth" movement.

In view of the foregoing, the summary judgment in favor of the defendant is clearly inappropriate and must be reversed as a matter of law. In addition, in view of the evidence, the plaintiff, Orisek, is entitled to a summary judgment in favor of the plaintiff with respect to the plaintiff's discharge by the defendant in March 1993, with compensatory and punitive damages as provided for by law.

5. The Court's claim of the lack of the statistical significance of the data in Chapter 1. is not tenable

First, the Court has erroneously concluded on page 16 (A.p. 38) of its decision that the statistical evidence in

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Chapter 1. of this brief, termed a "sample" by the Court, is not large enough and therefore it is not statistically significant. The Court's error lies in the fact that the statistical evidence in Chapter 1. is not a sample. The statistical evidence in Chapter 1. represents a complete set of management employees in the defendant's organization. Furthermore, it will be shown that the size of this data set is not an obstacle to the analysis of statistical significance of data.

The plaintiff's allegations of systematic discrimination by the defendant pertain to the defendant's management employees. Therefore, the defendant's evidence pertaining to all defendant's employees is not relevant in this context. The Court should not allow the defendant to refute the charge of discrimination of employees at the management level by compensatory evidence pertaining to lower level, clerical, mailroom, etc. employees.

In *Diaz v. American Tel. & Tel.*, 752 F.2d 1356, 36 FEP 1742 (9th Cir. 1985), the court stated:

> "Statistical data is relevant because it can be used to establish a general discriminatory pattern in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue. In some cases statistical evidence alone may be sufficient to establish a *prima facie* case."

Second, a plaintiff in a Title VII and ADEA action is required to prove the defendant's discriminatory motives by preponderance of evidence (see *McDonnell Douglas*), meaning that it is more likely than not that a discriminatory motive was present. More likely than not means the

probability of more than 50 percent.

A mere inspection of the statistical evidence in Chapter 1. of this brief reveals that the diverse group of management employees before June 1991 became after June 1991 a group consisting of predominantly young American males with no females and no members more than 60 years old. This fact is not disputed by the defendant and therefore stands. The defendant merely claims that this group is not representative of the defendant's employees. This defendant's claim is not relevant to this action.

Any person with elementary knowledge of statistical methods pertaining to small sets will conclude, by merely inspecting the statistical evidence in Chapter 1., that the quantitative differences, suggesting pretext, between the number of management employees in the protected classes before and after the June 1991 reorganization are statistically significant, i.e., the probability is more than 50 percent - and it is therefore more likely than not - that the differences are systematic and are not accidental or random.

But there is more. A mathematical statistics analysis (see A.p. 154 - 172) of the data shown in Plain. Aff., Item 9 and repeated in Chapter 1. of this brief, disproves the Court's claim of the lack of statistical significance in the data.

In *McDonnell Douglas*, the Supreme Court stated:

> "Evidence that may be relevant to any showing of pretext includes ..... petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks."

In *International Brotherhood of Teamsters v. United*

States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 396, 14 FEP 1514 (1977), the Supreme Court stated:

> "Our cases make it clear that 'statistical analyses have served and will continue to serve an important rule' in cases in which the existence of discrimination is a disputed issue."

Third, the results of the mathematical statistics analysis (A.p. 154 -172) show that the quantitative differences between the number of management employees in the protected classes before June 1991 and after June 1991, shown by the statistical evidence in Chapter 1., are statistically significant. Thus, these results support the plaintiff's allegations of discrimination against older, foreign born and female management employees by the defendant (please see A.p. 154 - 172 for details):

(1) The number of female managers:

The number of females in the group of management employees dropped from 3 (three) females (33 %) out of 9 (nine) management employees before June 1991 to no (none) females (0 %) out of 5 (five) management employees after June 1991 (please see Chapter 1.). The results of the mathematical statistics analysis (see A.p. 154 - 159) can be summarized as follows:

(i) If we assume that the probability of a woman being selected for a management position by the defendant is 50%, then the chances of having no women in the group of 5 managers after June 1991 are only 3.13%.

Thus, these results are statistically significant at the significance level of 3.13%. The chances of selecting no women in a group of five managers after June 1991 are only 1 in 32. The results confirm, at the significance level of 3.13%, that the defendant discriminated against women in

management positions after June 1991.

For a further explanation of the statistical significance and its relation to the legal significance please see A.p. 170 - 172. The concept of statistical significance was adopted by the Supreme Court in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768, 15 FEP 1 (1977) and in *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

(ii) It follows that the chances of the defendant selecting at least one woman in the group of five managers after June 1991 are 96.87%, calculated as 100% minus 3.13%.

Thus, at the confidence level of 96.87%, one or more women would have been included in the group of five managers after June 1991, if the probability of a woman being selected by the defendant for the management position is 50%, i.e. had women been given by the defendant the same opportunity as men to become managers in the defendant's organization.

(iii) This also indicates that the defendant's policy is particularly discriminatory with respect to the defendant's own female employees' chances of advancement into management positions given the fact that 46.5 percent of all defendant's employees were women. The female and male employees in the defendant's organization possess special qualifications, such as for instance the knowledge of foreign languages, necessitated by the nature of the defendant's activities.

In *Teamsters*, the Supreme Court explained in a footnote:

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who

possess the necessary qualifications) may have little probative value."

(iv) If we assume that the probability of a woman being selected for a management position by the defendant is 50%, the chances of having no women in the group of 5 managers after June 1991, i.e. 3.13%, are five times smaller than the chances of having 3 women in a group of 9 managers before June 1991, i.e. 16.41%.

In other words, the composition (i.e. the ratio of females to males) of the management group that was in effect after June 1991 is five times less likely than the composition of the management group that was in effect before June 1991.

(v) If and only if the probability of a woman being selected for a management position by the defendant is in actuality only 25 percent (and the probability of a man being selected is 75% - three times higher), which is clearly a discriminatory policy, then the chances of having no women in the group of 5 managers after June 1991, namely the chances of 23%, equal the chances of having 3 women in the group of 9 managers before June 1991.

In other words, the composition (i.e. the ratio of females to males) of the management group after June 1991 is equally likely as the composition of the management group before June 1991 if and only if the defendant discriminates against women and the probability of a woman being selected for a management position by the defendant is three times lower (25 percent for a woman as opposed to 75 percent for a man) than the probability of a man being selected by the defendant for the same position.

(2) The number of managers of foreign national origin:

The number of managers of foreign national origin

dropped from 7 (seven), i.e. 78 (seventy-eight) percent, out of 9 (nine) management employees before June 1991 to 2 (two), i.e. 40 (forty) percent, out of 5 (five) management employees after June 1991 (please see Chapter 1.). The results of the mathematical statistics analysis (A.p. 160 - 162) can be summarized as follows:

(i) The chances of having 2 managers of foreign national origin in a group of 5 managers after June 1991 equal the chances of having 7 managers of foreign national origin in a group of 9 managers before June 1991 if and only if the probability of the defendant selecting a person of foreign national origin for a management position dropped by circa 40 percent after June 1991.

(ii) In other words, as a result of the defendant's actions, a person of foreign national origin had a circa 40 (forty) percent lower probability of being selected by the defendant for a management position after June 1991 than before June 1991. Such a dramatic change suggests that the defendant's actions were not random but were systematic and, therefore, were discriminatory with respect to the management employees of foreign national origin.

(iii) It is clear that the probability of a person of foreign national origin being selected for a management position was more than 50 percent before June 1991 and less than 50 percent after June 1991, with the difference between the two being circa 40 percent.

(iv) This defendant's policy of selecting management employees is clearly discriminatory particularly with respect to the defendant's own employees' chances of advancement into management positions. It is so because approximately 56 percent of all the defendant's employees were of foreign national origin (see A.p. 57, AIAA-001444 and 001445 in

Plain. Aff., Ex. 1) given of the nature of the defendant's business that requires an extensive knowledge of foreign languages.

In *Hazelwood,* the Supreme Court stated:

> "Where gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination."

The rate of 56 percent is almost one-and-a-half times the predominant probability of 40 percent with which the defendant was selecting persons of foreign national origin for management positions after June 1991. While, the predominant probability of 40 percent would be high for an average employer, in the defendant's case it is low and discriminatory.

As we pointed out before, in *Teamsters*, the Supreme Court stated:

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller groups of individuals who possess the necessary qualifications) may have little probative value".

(3) The age of managers:

The average age of the 9 managers before June 1991 is 54.6 years and the corresponding standard deviation of the age is 10.2 years. On the other hand, the average age of the 5 managers after June 1991 is 42.8 years and the corresponding standard deviation of the age is 9.1 years. Please see the calculations (A.p. 163 - 169) which are based on the data (A.p. 57) in AIAA-001444 in Plain. Aff., Ex. 1 and the organization charts (A.p. 52, 59) in Plain. Aff., Ex. 13 and 14. The results of the mathematical statistics analysis (A.p. 163 - 169) can be summarized as follows:

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(i) The difference between the ages of managers before June 1991 and the ages of managers after June 1991 is statistically significant at the significance level of 6 (six) percent. For a further explanation of the statistical significance and its relation to the legal significance please see A.p. 170 - 172. As we pointed out before, the concept of statistical significance was adopted by the Supreme Court in *Hazelwood and in Castaneda.*

(ii) Thus, the chances are 94 (ninety-four) percent that the ages of managers before June 1991 and after June 1991 come from two different populations and that the differences between the ages of managers before June 1991 and after June 1991 are not caused by random sampling fluctuations, but these differences in ages of managers are systematic, and are therefore caused by the defendant's discriminatory policies.

(iii) It is therefore more likely than not, in fact it is much more likely than not, namely the chances are 94 (ninety-four) percent, that the defendant discriminated against management employees in higher age groups. This satisfies the plaintiff's burden under the Title VII and ADEA action which requires the plaintiff to prove by preponderance of evidence, meaning that it is more likely than not, namely that the chances are more than 50 (fifty) percent, that the defendant discriminated against management employees in higher age groups.

6. The Court errs in concluding that the general atmosphere of discrimination is not relevant

The Court errs when it concludes on page 14 (A.p. 36) of its decision that the "disparaging remarks", verified by the

evidence, are not relevant. The Court gives the following reasons:

(i) There is no evidence that these remarks were directed at the plaintiff.

(ii) There is no evidence that the people responsible for the decision to terminate the plaintiff - Worton and Lawrence - made such remarks and tolerated such remarks.

(iii) The American male employee who made such remarks was terminated within two months.

(iv) Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus.

This is not so:

> "The trial court did not err in allowing Ms. Convay's supervisor to testify that, when asked his supervisor for a raise for Convey, he was told that Convey made enough money and was one of the highest-paid women in the company. Nor was it in error to allow another female employee to relay the statement made to her by a superior (who, at the time of Convay's dismissal, was company president) when she requested a raise: 'No, I don't think so, Pat. For a woman supervisor, you do very well.' The court found that this evidence of a 'corporate state of mind' added 'color' to the employer's decision-making process and was not rendered irrelevant because the statements were not contemporaneous with the timeframe involved in Convay's claim of sex discrimination" (see *Convey v. Electro Switch Corp.*, 825 F.2d 593, 44 FEP 753 (1st Cir. 1987).

The disparaging and inflammatory remarks are evidenced by (A.p. 70) Paragraph 12 of the plaintiff's affirmation in opposition to the defendant's motion for

summary judgment.

First, the defendant has continually tolerated such inflammatory remarks. Tony Lenti, whom the evidence identifies as making such remarks in 1992 and who was known to make such remarks, worked under the direct supervision of Lawrence and is today the head of the defendant's New York office. The evidence records multiple instances of Lenti making such remarks, Lenti was known to make such remarks and the probability is nil that Lawrence never heard Lenti's remarks or never heard of them. Therefore, the evidence shows that the defendant in general and Lawrence in particular tolerated Lenti's inflammatory remarks.

Second, the defendant provides no evidence that the American male, Doherty, whom the evidence identifies as making inflammatory remarks, was terminated because of these remarks.

Third, some of these offensive remarks were made in the presence of plaintiff including the remark "those foreigners", while the plaintiff is of foreign origin and has a foreign accent.

Fourth, these were not isolated remarks, but were fairly wide-spread after 1991, as shown by the evidence.

7. The matter of the plaintiff's deposition on February 7 and 8, 1996

It is respectfully requested that the entire content of the plaintiff's deposition, conducted by the defendant on February 7 and 8, 1996, be suppressed. This request is being made for the following reasons:

(i) The plaintiff is a pro se plaintiff and is not

represented or advised by an attorney.

(ii) The plaintiff went to the deposition on February 7, 1996 with a specific understanding that her husband would attend the deposition with her and provide advice and moral support.

(iii) The defendant had the plaintiff's husband ejected by calling Magistrate Judge Fox's chambers. Magistrate Judge Fox never came to the phone nor was the plaintiff given the opportunity to plead her case with the Judge.

(iv) The plaintiff complained about this matter in a letter to Magistrate Judge Fox dated February 13, 1996. The account of this matter is given by Magistrate Judge Fox on the pages 3 through 5 (A.p. 173 - 176) of the transcript of the status conference held on February 15, 1996.

(v) In the transcript, Magistrate Judge Fox clearly holds his decision to be erroneous and rejects the defendant's reasons for the ejection of the plaintiff's husband.

(vi) All this took place at the very beginning of this action and the inexperienced plaintiff was clearly bewildered by the proceedings. For instance, during the deposition the defendant's counsel insinuated and pursued a line of questioning to the effect that there was an unlawful collusion between the plaintiff and an outside supplier of equipment to the defendant's organization. The plaintiff complained of harassment during the deposition.

(vii) Specifically, the plaintiff was unfamiliar with the legal maneuvering practiced by attorneys and might have made statements she would have phrased differently under the advice of a counsel, or if the plaintiff's husband were present.

(viii) The defendant's actions in this matter were nothing less than a successful attempt to put the inexperienced

plaintiff at an unfair disadvantage. The cause of justice will be served poorly if this Court upholds the defendant's actions in this matter.

8. The Court's errors in interpreting statutes related to damages under TITLE VII and ADEA claims, and other miscellaneous issues

In the background section of its decision, pages 1 through 3, the Court simply paraphrases the defendant's motion for summary judgment and the memorandum of law and when doing so, the Court makes a number of erroneous statements, which have no basis in the law and in the evidence but have clearly influenced this Court's decision in this matter, such as, but not limited to:

(1) "Compensatory and punitive damages are not available under the ADEA and are limited to $50,000 under Title VII." This is at variance both with 42 USC 1981a (b) (3) of Title VII and with 29 USC 626 (b) of the ADEA. Each of these statutes provides for substantial compensatory and punitive damages far in excess of $50,000. Please see Addendum to this brief.

It is worth noting that the Court has in fact erred in paraphrasing the defendant's memorandum of law and, thus, departed even farther from the law than the defendant, who said - erroneously with respect to this action - on pages 18 and 19 (A.p. 177 - 178) of its memorandum of law:

> "Compensatory and punitive damages are not available under the ADEA. 29 USC 626 (b) provides, at most, double damages, and then only in the event that an employer willfully violated its provisions. ..... Moreover, under Title VII, an award of compensatory

> damages plus punitive damages is limited to a maximum of $50,000 against an employer with less than 101 employees. 42 USC 1981a (b) (3). AIAA-NY has, at present, less than 20 employees."

Furthermore, the Court should have realized but did not realize that the current number of employees in the defendant's New York division, which is not a separate and legally independent entity, is immaterial and has no bearing on the damage recovery. The damage recovery is governed by the total number of AIAA employees at the time of violation of statutes.

The foregoing defendant's statements amount to a deception by the defendant and its counsel because the defendant's counsel does know better, as evidenced by a letter (A.p. 179) to the plaintiff dated March 12, 1996. The defendant's counsel, while not necessarily exhausting the full scope of the statutes, states in the letter of March 12, 1996:

> "42 USC 1981a (b) (3) of Title VII (the basis for your gender and national origin claims), limits your compensatory and punitive damage recovery combined to $100,00 for employers like AIAA with more than 100 but less than 201 employees. 29 USC 626 (b) of the ADEA (the basis of your age claim), limits your liquidated (punitive) damage recovery to an amount equal to your lost earnings."

It is easy to see how the Court, after a cursory review of the Defendant's memorandum of law, fell for this deception and, moreover, erred even more by adapting in its decision only a portion of the defendant's erroneous statements.

This matter and the errors made by the Court in this particular matter are important to this action as the erroneous denial of the existence of the damage recovery under the

statutes invalidates the purpose of this action.

Finally, the type of deception described above has been repeatedly practiced by the defendant throughout this action. The plaintiff previously complained about this type of conduct by the defendant. The plaintiff therefore respectfully requests that this Court consider appropriate sanctions against the defendant and its counsel in connection with this and similar deceptions.

(2) "(Orisek) worked for the Institute in the New York Division from 1976 until she was terminated in 1993, first in a clerical position and finally in the User Services Department in the position of Operations Computer Support Analyst."

This is at variance with numerous pieces of evidence, such as e.g. (A.p. 50) AIAA-000023 in Plaintiff's Affirmation, Exhibit 6 because it omits both plaintiff's management experience as AIAA Supervisor - Document Processing as well as plaintiff's experience as AIAA Assistant Librarian. The experience omitted by the Court is highly relevant to this action.

(3) "In 1990, (Orisek) also worked as Assistant Librarian." This is at variance with (A.p. 50) AIAA-000023 in Plain. Aff., Ex. 6 in that this event occurred a decade earlier.

(4) "....., in June of 1991, Orisek was reassigned from the supervision of Irene Bogolubsky, the Institute's Technical Director, to the User Services Department under the direction of Geoff Worton."

This contradicts (A.p. 138) AIAA-000236 in Plaintiff's Affirmation, Exhibit 12 that states very clearly in its first paragraph: "In January 1992, TIS (i.e. defendant's New York division) employed a total of 69 employees. User

Services did not exist at this point in time".

Here, the Court erroneously relies on the defendant's statement (A.p. 180) in Def. Rule 3(g) Statement, Page 6, Item 17 which itself is in error. The foregoing - as well as other items discussed in this brief - contains an irrefutable proof of the fact that the defendant's sworn testimony regarding the central issues of this action (such as plaintiff's work, performance, experience and work history) is untrustworthy, because it is contradicted by the defendant's own documents obtained by this plaintiff during the discovery.

More importantly, despite admissible evidence submitted by this plaintiff, the Court made no effort to uncover the truth before it arrived at its decision, all in spite of the fact that the above was pointed out and discussed in the plaintiff's response to the defendant's motion for summary judgment.

In addition, as it is shown in this brief, this did not deter the Court from considering fully as reliable evidence the defendant's own statements uncorroborated by any other evidence. On the other hand the Court described as "unreliable" the plaintiff's quantitative data, pleadings and diagrams, supported by the contemporaneous documentation the plaintiff obtained from the defendant during the discovery.

CONCLUSION

The plaintiff pro se respectfully advises this Court that throughout this case, various parties made the plaintiff aware in no uncertain terms that her case, pleadings and evidence would not be accorded and will not be accorded the same consideration as a case, pleadings and evidence submitted by

a party that is represented by an attorney. Nevertheless, the plaintiff has proceeded based on the fact that under the law the plaintiff pro se is entitled to the same consideration as a party represented by an attorney. The plaintiff's sole reason for not being represented by an attorney is the prohibitive cost of such representation. At the inception of this case with a complaint filed with EEOC in 1993, it was anticipated that this case could consume 1,000 hours of an attorney's time. It appears that this estimate may be exceeded.

The plaintiff respectfully asks that this Court reverse the judgment entered herein, with a finding of fact in favor of the appellant, and enter a summary judgment for the plaintiff with compensatory and punitive damages as provided for by the law; or if the Court does not feel that it would be justified by the facts in so doing that the Court remand the case for a fair and impartial trial before an unprejudiced jury, on proper evidence and under correct instructions as the law may deem just and proper.

Respectfully submitted,

s/ OLGA ORISEK, Pro Se
Plaintiff - Appellant

Appendix D

95 CV 9774

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK

OLGA ORISEK,

Plaintiff

v.

AMERICAN INSTITUTE OF AERONAUTICS
AND ASTRONAUTICS,

Defendant

MATHEMATICAL STATISTICS ANALYSIS OF DEFENDANT'S EMPLOYMENT PRACTICES

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Mathematical statistics analysis of data presented in the Plaintiff's Affirmation, Item 10

The Court claims on page 16 of its decision that the data presented by the plaintiff in the Plaintiff's Affirmation, Item 10 represents a sample which is not large enough and, therefore, the data is not statistically significant. The following mathematical statistics analysis will defeat this claim. It will show that the small number of data points in the data set poses no obstacle to the statistical analysis of the significance of the data and that, in fact, *the data is statistically significant*. These data sets are not samples but, contrary to the Court's belief, they are *complete sets* of management employees before June 1991 and after June 1991.

The number of female managers

There were 3 (three) females in the group of 9 (nine) managers before June 1991. After June 1991, there were no (none) females in the group of 5 (five) managers.

We will use high school level combinatorics in conjunction with binomial distribution of a bivariate **x**. The Supreme Court employed the same binomial distribution in determining the chances of hiring blacks and whites in *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

The bivariate **x** has only two outcomes: Either (1) the defendant selects a woman for the management position or (2) the defendant selects a man for the management position.

We will call **p** the probability that the defendant selects a woman for the management position. This simply means, that in **N** successive, unbiased, independent selections the defendant selects a woman for a management position (**p** x **N**) times. For

instance, if **p** equals 0.5, on the average the defendant selects a woman 50 times in 100 selections.

It is evident that **p** cannot be less than 0 (impossibility or 0%) or more than 1.0 (certainty or 100%). It then follows that the probability that the defendant selects a man for the management position is simply (1 - **p**).

For a specific number of management positions **n**, we can now easily determine the chances that the defendant selects **k** women and (**n** - **k**) men to staff **n** management positions. These chances are

$$C(\mathbf{n},\mathbf{k}) \times \mathbf{p}^{\mathbf{k}} \times (1 - \mathbf{p})^{\mathbf{n}-\mathbf{k}} \quad , \qquad (1)$$

where

$$C(\mathbf{n},\mathbf{k}) = \frac{\mathbf{n}!}{(\mathbf{n} - \mathbf{k})!\ \mathbf{k}!} \qquad (2)$$

denotes the total number of combinations of **k** women and (**n** - **k**) men in **n** management positions. **n!** denotes the factorial of **n** which equals 1 x 2 x 3 x ..... x **n**. As an example, the factorial of 3, or 3!, equals 1 x 2 x 3 which is 6.

Also as an example, using the formula (2) above, all possible combinations of 2 elements out of the total of 3 elements, or C(3,2) equal

$$\frac{3!}{1!\ 2!} = \frac{1 \times 2 \times 3}{1 \times 1 \times 2} = \frac{6}{2} = 3$$

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Therefore, according to the formula (1) above, if **p** equals 0.5, the chances that the defendant would select two women and one man to staff three management positions are

$C(3,2) \times 0.5^2 \times (1 - 0.5)^1$ which equals

$3 \times 0.25 \times 0.5 = 0.375$ or 37.5 percent.

To prove the correctness of the formulas (1) and (2) above, let us consider the following. Let us calculate the chances of <u>all</u> the other possible outcomes when the defendant is staffing 3 management positions with women and men, if **p** equals 0.5. If the formulas (1) and (2) above are correct, then the sum of the chances of all possible outcomes must be 1.00 or 100 percent:

The chances of selecting three women and no men are

$C(3,3) \times 0.5^3 \times (1 - 0.5)^0$ which equals

$1 \times 0.125 \times 1 = 0.125$ or 12.5 percent

(In order to perform this calculation, remember that 0! in C(3,3) equals 1, and, $(1 - 0.5)^0$ also equals 1.)

The chances of selecting one woman and two men are

$C(3,1) \times 0.5^1 \times (1 - 0.5)^2$ which equals

$3 \times 0.5 \times 0.25 = 0.375$ or 37.5 percent

The chances of selecting no women and three men are

$C(3,0) \times 0.5^0 \times (1 - 0.5)^3$ which equals

$1 \times 1 \times 0.125 = 0.125$ or 12.5 percent

Thus, the sum of the chances of all possible outcomes enumerated directly above is C(3,2) + C(3,3) + C(3,1) + C(3,0) which is 37.5 % + 12.5% + 37.5% + 12.5%, which equals 100%. This proves that the formulas (1) and (2) above are correct. Q.E.D.

Similarly, we can now calculate a complete distribution of the bivariate **x** for the situation after June 1991, namely for **n** = 5 management positions, assuming the probability **p** = 0.5 or 50%.

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Note that, again, the total of all the chances of all possible outcomes calculated below is 100%:

The chances of the defendant selecting no women and five men are: C(5,0)= 0.0313 or 3.13%

The chances of the defendant selecting one woman and four men are: C(5,1)= 0.1562 or 15.62%

The chances of the defendant selecting two women and three men are: C(5,2)= 0.3125 or 31.25%

The chances of the defendant selecting three women and two men are: C(5,3)= 0.3125 or 31.25%

The chances of the defendant selecting four women and one man are: C(5,4)= 0.1562 or 15.62%

And finally, the chances of the defendant selecting five women and no men are: C(5,5)= 0.0313 or 0.313%

This shows that, assuming that the probability **p** that the defendant selects a woman for the management position is equal 0.5 or 50%, meaning that the defendant gives women and men the same chance to become a manager, the chances of selecting no women and five men to staff five management positions, which is exactly what the defendant did in June 1991, are only 3.13% which is pretty close to impossibility.

Conversely, the chances of selecting at least one woman in the group of five managers in June 1991 are overwhelming, namely 96.87%, calculated as 100% minus 3.13%, which is pretty close to certainty.

We will see shortly that **p** is not always 0.5 or 50%. **p** equal to 50% means that the defendant gives women the same chances of becoming a manager as it gives men. The defendant who does discriminate against women will give women less chance to become a manager than it gives men and, therefore, the probability **p** will be less than 50% or 0.5.

We can now go back and for various values of **p**, namely the probability that the defendant selects a woman for the

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management position, calculate the chances of having 3 women in a group of 9 managers, which was the situation in the defendant's organization before June 1991. Similarly, we can now calculate the chances of having no women in a group of 5 managers, which was the situation in the defendant's organization after June 1991. The results are in Table 1.

Table 1

The probability that defendant selects a female manager **p**	The chances of having, for various values of **p**, Before June 1991: 3 women out of 9 managers $C(9,3) \times \mathbf{p}^3 \times (1-\mathbf{p})^6$	After June 1991: No women out of 5 managers $C(5,0) \times \mathbf{p}^0 \times (1-\mathbf{p})^5$
0.00	0.0000	1.0000
0.01	0.0001	0.9500
0.10	0.0446	0.5945
0.20	0.1762	0.3277
0.25	0.2336	0.2373
0.40	0.2508	0.0778
0.45	0.2119	0.0503
0.50	0.1641	0.0313
0.75	0.0087	0.0010
1.00	0.0000	0.0000

The main results portrayed by Table 1 are outlined below:

1. If we assume that the probability of a woman being selected by the defendant for the management position is **p** =

0.50 (i.e. **p** = 50%), than the chances of having no women in a group of 5 managers after June 1991 are only 0.0313, i.e. 3.13%. In *Spight v. Tidwell Industries*, 551 F. Supp. 123, 30 FEP 1423 (N.D. Miss. 1982), plaintiffs presented statistical evidence that only two blacks (3.45%) out of a workforce representation of 14.2% had been promoted in the 58 employment decisions under review. This, coupled with specific instances of discrimination, unwritten and highly subjective promotion criteria, and the fact that the supervisory staff was all white, convinced the court that plaintiffs had established an inference of deliberate, discriminatory treatment.

Thus, these results are statistically significant at the significance level of 3.13%. The chances of selecting no women in a group of five managers after June 1991 are only 1 in 32. *We therefore reject, at the significance level of 3.13%, the hypothesis that the defendant did not discriminate against women in management positions and confirm, at the significance level of 3.13%, that the defendant discriminated against women in management positions after June 1991.*

The concept of statistical significance as related to legal significance was adopted by the Supreme Court in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768, 15 FEP 1 (1977) and in *Castaneda v. Partida*, 430 U. S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). Recognizing the weakness of simple comparison techniques, the Supreme Court, in *Hazelwood*, recognized the desirability of having a numerical basis for determining when observed differences in selection rates are legally significant and employed the mathematical concept of "statistical significance" of a disparity.

2. It then follows that the chances of the defendant selecting at least one woman in the group of five managers after June 1991 are 96.87%, calculated as 100% minus 3.13%.

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Thus, at the confidence level of 96.87%, one or more women would have been included in the group of five managers after June 1991, if the probability of a woman being selected by the defendant for the management position is **p** = 0.5 (i.e. **p** = 50%).

- 3. This also indicates that the defendant's policy is particularly discriminatory with respect to the defendant's own female employees' chances of advancement into management positions given the fact that 46.5 percent of all defendant's employees were women. The female and male employees in the defendant's organization possess special skills, such as for instance the knowledge of foreign languages, necessitated by the nature of the defendant's activities.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 396, 14 FEP 1514 (1977), the Supreme Court explained in a footnote:

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller groups of individuals who possess the necessary qualifications) may have little probative value".

4. Finally, if we assume that the probability of a woman being selected for a management position is 50%, then the chances of having no woman in a group of five managers after June 1991, i.e 0.0313 or 3.13%, are five times smaller than having 3 women in a group of 9 managers before June 1991, i.e. 0.1641 or 16.41%.

If and only if the probability of a woman being selected for a management position by the defendant is in actuality only 25 percent (and the probability of a man being selected is 75% - three times higher), which is clearly a discriminatory policy, then the chances of having no women in the group of 5 managers after June 1991 equal the chances of having 3 women in the group of 9 managers before June 1991.

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The number of managers of foreign national origin

There were 7 (seven) managers of foreign national origin in the group of 9 (nine) managers before June 1991. After June 1991, there were 2 (two) managers of foreign national origin in a group of 5 (five) managers.

As in the previous case, we will use the same high school level combinatorics in conjunction with binomial distribution of a bivariate **x**. As we noted before, the Supreme Court employed the same binomial distribution in *Castaneda*.

The bivariate **x** has in this case the following two outcomes: Either (1) the defendant selects a person of a foreign national origin for the management position or (2) the defendant selects an American for the management position. *Note*: In order to simplify the terminology for the purposes of this analysis, the term "American" is used to describe any person other than a person of a foreign national origin.

We will call **p** the probability that the defendant selects a person of a foreign national origin for the management position. It then follows that the probability that the defendant selects an American for the management position is (1 - **p**).

For a specific number of management positions **n**, we can now determine the chances that the defendant selects **k** persons of foreign national origin and (**n** - **k**) Americans to staff **n** management positions.

These chances are

$$C(\mathbf{n},\mathbf{k}) \times \mathbf{p}^{\mathbf{k}} \times (1 - \mathbf{p})^{\mathbf{n}-\mathbf{k}} \quad , \qquad (3)$$

where

$$C(\mathbf{n},\mathbf{k}) = \frac{\mathbf{n}!}{(\mathbf{n} - \mathbf{k})!\ \mathbf{k}!} \qquad (4)$$

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denotes the total number of combinations of **k** persons of foreign national origin and **(n - k)** Americans in **n** management positions. **n!**, **(n - k)!** and **k!** denote factorials of **n**, **(n - k)** and **k**. The results are in Table 2.

Table 2

The probability that defendant selects person of foreign nat. origin - **p**	The chances of having, for various values of **p**, Before June 1991: 7 foreigners out of 9 managers $C(9,7) \times p^7 \times (1-p)^2$	After June 1991: 2 foreigners out of 5 managers $C(5,2) \times p^2 \times (1-p)^3$
0.00	0.0000	0.0000
0.01	0.0000	0.0010
0.10	0.0000	0.0729
0.20	0.0003	0.2048
0.25	0.0012	0.2637
0.30	0.0039	0.3087
0.40	0.0212	0.3456
0.50	0.0703	0.3125
0.60	0.1612	0.2304
0.70	0.2668	0.1323
0.75	0.3003	0.0879
0.80	0.3020	0.0512
0.90	0.1722	0.0081
1.00	0.0000	0.0000

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The main results portrayed in Table 2 are outlined below:

1. The chances of having 7 persons of foreign national origin in the group of 9 managers before June 1991 are concentrated around **p** = 0.75 to **p** = 0.80 (i.e. **p** between 75% and 80%).

2. The chances of having 2 persons of foreign national origin in the group of 5 managers after June 1991 are concentrated around **p** = 0.40 (i.e. **p** = 40%). This means circa 40 percent drop after June 1991 in the probability that the defendant selects a person of a foreign national origin for the management position. Such a dramatic change suggests that the defendant's actions were not random but were systematic and, in fact, discriminatory with respect to the management employees of foreign national origin.

3. The chances of having two persons of foreign national origin in a group of five managers after June 1991 equal the chances of having 7 persons of foreign national origin in a group of 9 managers before June 1991 if and only if the probability **p** of the defendant selecting a person of a foreign national origin for the management position dropped by circa 40 percent after June 1991.

4. It is clear that the probability of a person of a foreign national origin being selected by the defendant for a management position was more than 50 percent before June 1991 and less than 50 percent after June 1991, with the difference between the two being circa 40 percent.

This defendant's policy is clearly discriminatory particularly with respect to the defendant's own employees' chances of advancement into management positions given the fact that, because of the nature of the defendant's activities which require *special qualifications* such as the knowledge of foreign languages, approximately 56 percent of all defendant's employees were of foreign national origin.

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5. The rate of 56 percent is almost one-and-a-half times the predominant probability of **p** = 40% with which the defendant was selecting persons of foreign national origin for management positions after June 1991. Thus, while the predominant probability of **p** = 40% would be high for an average employer, in the defendant's case **p** = 40% is clearly low and discriminatory.

In *Teamsters*, the Supreme Court stated:

> "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller groups of individuals who possess the necessary qualifications) may have little probative value".

The age of managers

The ages of the 9 (nine) management employees before June 1991 were as follows: 37, 44, 45, 55, 56, 62, 63, 64, and 65 years. The ages of 5 (five) management employees after June 1991 were: 32, 37, 44, 45, and 56 years.

The question is whether we can accept the hypothesis that the ages of the 9 management employees before June 1991 come from the same population, described by the same distribution, as the ages of the 5 management employees after June 1991. We will call this hypothesis a *null hypothesis*. Please see Figure 1 below.

The *alternative hypothesis* is the hypothesis that the ages of managers before June 1991 and after June 1991 come from two different populations, described by two different distributions. Please see Figure 1 below.

Using elementary statistical methods, we will show that the ages of the management employees before June 1991 and after June 1991 come from two different populations with different averages. We will therefore show, that the difference between

the ages before June 1991 and after June 1991 is not caused by a sampling error only, but that this difference is systematic, caused by the defendant's discriminatory policies against managers in higher age groups.

The pertinent statistical method is the *analysis of variance*. In *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), the Supreme Court adopted the *standard deviation* method as the test of *statistical significance*. For the purposes of our analysis, it is important to understand that the *standard deviation is merely a square root of the variance*.

Note 1: Strictly speaking, the version of the analysis of variance we will use assumes that the populations follow a normal distribution with different averages but the same variance. Fortunately, the analysis of variance is a *robust test*. This means that the analysis of variance gives usable results even if the distributions of the populations are not quite normal and if the variances in the two populations are somewhat different.

Note 2: It is shown below, that the variances in the two populations are close enough as they differ only by 25 (twenty-five) percent; they are, respectively, 82.7 years and 104.8 years. Furthermore, the test of the assumption of the normality of the two age distributions was performed using the *W test*. The W test indicates strongly normal and close to normal distributions of age.

We will call $\underline{x}_1$ the *average* age of 9 management employees before June 1991 and $\underline{x}_2$ the *average* age of 5 management employees after June 1991. Therefore,

$$\underline{x}_1 = \frac{37 + 44 + 45 + 55 + 56 + 62 + 63 + 64 + 65}{9}$$

$$= 54.5556 \text{ years}$$

and

$$\underline{x}_2 = \frac{32 + 37 + 44 + 45 + 56}{5} = 42.8000 \text{ years}$$

It is well known from the elementary statistics that the unbiased estimate of the *variance* s_1^2 of the ages of managers before June 1991 is

$$s_1^2 = \frac{(37-\underline{x}_1)^2 + (44-\underline{x}_1)^2 + (45-\underline{x}_1)^2 + \ldots\ldots + (65-\underline{x}_1)^2}{(n-1)}$$

$$= 104.7777$$

where $n_1 = 9$ means the number of management employees before June 1991. Similarly, the unbiased estimate of the *variance* s_2^2 of the ages of managers after June 1991 is

$$s_2^2 = \frac{(32-\underline{x}_2)^2 + (37-\underline{x}_2)^2 + \ldots\ldots + (56-\underline{x}_2)^2}{(n_2-1)} = 82.7008$$

where $n_2 = 5$ means the number of management employees after June 1991.

The corresponding *standard deviations* s_1 and s_2, recognized by the Supreme Court in *Castaneda* as part of the test of the statistical significance, are the square roots of the variances s_1^2 and s_2^2:

$$s_1 = (s_1^2)^{1/2} = (104.7777)^{1/2} = 10.2361 \text{ years}$$

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and

$$s_2 = (s_2^2)^{1/2} = (82.7008)^{1/2} = 9.0940 \text{ years}$$

Let us calculate a simple weighted average s_w^2 of the two unbiased estimates of variance s_1^2 and s_2^2:

$$s_w^2 = \frac{(n_1 - 1)s_1^2 + (n_2 - 1)s_2^2}{n_1 + n_2 - k} = \qquad (5)$$

$$= \frac{(8 \times 104.7777) + (4 \times 82.7008)}{9 + 5 - 2} = 97.4187$$

where **k** denotes the number of sets (**k** = 2) of ages of managers, one set before June 1991 and the other set after June 1991. Similarly to (n_1 - 1) and (n_2 - 1) in the calculations of s_1^2 and s_2^2 above, **k** is used merely to obtain an *unbiased* estimate of variance of the age of managers.

If the null hypothesis in Figure 1 below is correct, then s_w^2 is our best estimate of the variance of the age of managers. The subscript **w** in s_w^2 stands for "within". This is because the only information we are using for the calculation of the variance of the age of managers is information contained "within" the two separate sets of ages of managers. In calculating s_w^2, we are not using any information contained in the relationship "between" the two separate sets of ages of managers.

We are now going to calculate the variance of the age of managers in a different way, taking into account the relationship "between" the two separate sets of ages of managers; one set of

ages before June 1991 and the other set of ages after June 1991. We will call the result s_b^2 where the subscript **b** stands for "between". The variance s_b^2 does take into account the relationship "between" the two separate sets of ages of managers.

The important point to realize is the following: If the null hypothesis in Figure 1 is correct, then the variances s_w^2 and s_b^2 must be close to each other and the ratio

$$F = \frac{s_b^2}{s_w^2}$$ must be close to 1.

If, however, the null hypothesis in Figure 1 is incorrect and the alternative hypothesis in Figure 1 is correct, then the variances s_w^2 and s_b^2 will be vastly different and the ratio **F** will be significantly greater than 1.

Figure 1
Probability density function of the distribution of age

Null hypothesis

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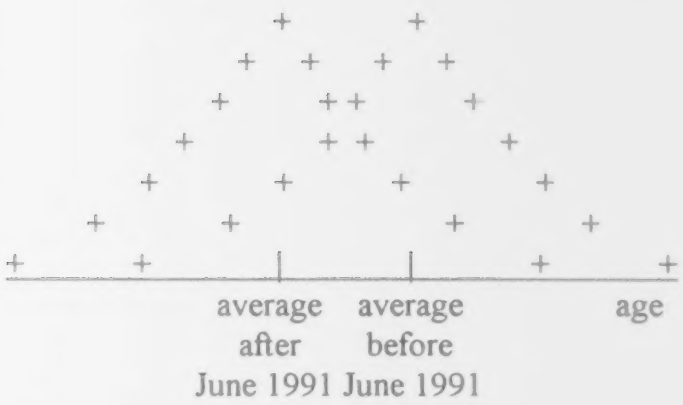
Figure 1

Alternative hypothesis



To determine the variance s_b^2, we will first calculate the overall average $\underline{x}$ as a simple weighted average of the two averages $\underline{x}_1$ and $\underline{x}_2$ of the age of managers before June 1991 and after June 1991:

$$\underline{x} = \frac{n_1 \underline{x}_1 + n_2 \underline{x}_2}{n_1 + n_2} = \frac{(9 \times 54.5556) + (5 \times 42.8)}{9 + 5}$$

$$= 50.3572 \text{ years}$$

The overall average $\underline{x}$ has its own variance $s_{\underline{x}}^2$ which is calculated in the same way as the variances s_1^2 and s_2^2 above:

$$s_{\underline{x}}^2 = \frac{(\underline{x}_1 - \underline{x})^2 + (\underline{x}_2 - \underline{x})^2}{k - 1}$$

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$$= \frac{(54.5556 - 50.3572)^2 + (42.8 - 50.3572)^2}{1} = 74.7378$$

where $\mathbf{k} = 2$ is the number of sets of the ages of managers, one set before June 1991 and the other set after June 1991.

The variance s_b^2 we are after is

$$s_b^2 = \frac{n_1(\underline{x}_1 - \underline{\underline{x}})^2 + n_2(x_2 - \underline{\underline{x}})^2}{k - 1} = \qquad (6)$$

$$= \frac{9 \times (54.5556 - 50.3572)^2 + 5 \times (42.8 - 50.3572)^2}{1}$$

$$= 444.1954$$

We can calculate s_b^2 in this way because, as it is known in the elementary statistics, generally the variance of the age of managers equals $\mathbf{n}$ times the variance $s_{\underline{x}}^2$ of the *average age* of managers.

The ratio $\mathbf{F}$ is therefore

$$F = \frac{s_b^2}{s_w^2} = \frac{444.1954}{97.4187} = 4.5597$$

The ratio $\mathbf{F}$ is much bigger than 1 and it suggests that the null hypothesis is incorrect and the alternative hypothesis must therefore be correct. All we need to determine now is whether the value of $\mathbf{F} = 4.5597$ is *statistically significant*.

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The concept of statistical significance as related to legal significance was adopted by the Supreme Court in *Hazelwood School District v. United States*, 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768, 15 FEP 1 (1977) and in *Castaneda v. Partida*, 430 U. S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). The Court realized the weakness of simple techniques comparing percentages and, in *Hazelwood*, recognized the desirability of having a numerical basis for determining when observed differences in selection rates are legally significant and employed the mathematical concept of "statistical significance" of disparity.

As we said before, the variances s_w^2 and s_b^2 are estimates of the variance, which we will now call S^2, of the ages of managers assuming that the null hypothesis is true. The distributions of s_b^2 / S^2 and s_w^2 / S^2 follow a so called chi^2 ["chi square"] distribution with the associated degrees of freedom represented by the denominators in the formulas (5) and (6) above.

The concept of the chi^2 distribution of the ratio s^2 / S^2 has been used in assessing the significance of discrepancies in success or failure rates of various groups on employment tests in *Chance v. Board of Examiners*, 330 F. Supp. 203, 3 FEP 672 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167, 4 FEP 596 (2d Cir. 1972).

Thus, the ratio

$$F = \frac{s_b^2}{s_w^2} = 4.5597 \sim 4.56$$

is the ratio of these two chi^2 distributions with 1 degree of freedom associated with the numerator and 12 degrees of freedom associated with the denominator. In such a distribution,

the ratio **F** exceeds the value of 9.33 with the probability of only 1 (one) percent and the value of 4.75 with the probability of only 5 (five) percent. Furthermore, the probability is less than 6 (six) percent that the ratio **F** would reach the value as high as 4.56. This means that if the null hypothesis in Figure 1 above is correct, the value 4.56 or larger appears only less than 6 percent of the time in a one-tailed test.

In a one-tailed test, the statistical significance is concentrated at one end of the distribution. This is the situation when we say that the value of a variable exceeds a certain fixed limit at a particular level of significance.

In a two-tailed test, the statistical significance is divided between both ends of the distribution. This is the situation when we say that the value of a variable is either greater than a certain fixed upper limit or it is smaller than a certain fixed lower limit at a particular level of significance.

In *Palmer v. Schultz*, 815 F.2d 84, 43 FEP 452 (D.C. Cir. 1987), the circuit court, in reviewing the statistical evidence presented to support the Title VII case, noted the difference between a one-tailed test used to determine the statistical significance and a two-tailed test.

Thus, the value of **F** = 4.56 is *statistically significant* at the significance level of 6 (six) percent (1 in 17) and, therefore, we reject the null hypothesis in Figure 1 above at the significance level of 6 percent.

Conversely, the value of **F** = 4.56 lies outside the band of values that would confirm the validity of the null hypothesis at the confidence level of 94 (ninety-four) percent.

This means that it is more likely than not, and in fact it is much more likely than not, namely the probability is 94 (ninety-four) percent, that the two distributions of the age of the managers, one before June 1991 and the other after June 1991, are two different distributions with two different average ages. *It*

is therefore more likely than not, in fact much more likely than not, namely the probability is 94 percent, that the defendant discriminated against management employees in the higher age groups after June 1991.

Statistical significance v. legal significance

The concept of statistical significance as related to legal significance was adopted by the Supreme Court in *Hazelwood* and in *Castaneda*. Recognizing the weakness of simple comparison techniques, the Supreme Court, in *Hazelwood*, recognized the desirability of having numerical basis for determining when observed differences in selection rates are legally significant and employed the mathematical concept of "statistical significance" of disparity. This concept had been previously used by the Court in a jury selection case in *Castaneda*. The *Castaneda* opinion includes a more elaborate discussion of statistical significance than the one found in the *Hazelwood* opinion. Specifically, the test of statistical significance adopted by the Court was the "standard deviation" method.

This deserves a further explanation. In *Hazelwood*, the Court stated that the discrimination was inferred when "the difference between the expected value and the observed number is greater than two or three standard deviations". This is the same as saying "statistically significant at the level of significance of 5 (five) percent or 1 (one) percent. The huge difference between two and three standard deviations, and the Court's language in the footnote together suggest that the Court in *Castaneda* did not intend to fix any specific test value of statistical significance. (Strictly speaking, the numerical level of significance can be expressed in terms of a specific number of standard deviations only in a symmetrical normal distribution.)

Similarly, in *Rendon v. AT&T Technologies*, 883 F.2d 388, 50 FEP 1587 (5th Cir. 1989), the court held that there is no "strict legal benchmark" requiring data to be within a specific standard deviation to show significance.

Indeed, *the level of statistical significance* of 10% (1 in 10), 8%, 5% (1 in 20), 3%, 1%, 0.5% (1 in 200) or any other percentage commonly used in mathematical statistics for the testing of hypotheses, *is actually the maximum risk, we are going to accept, that the null hypothesis in Figure 1 above will be rejected when it is in fact correct. Thus, the level of statistical significance is equivalent to the risk of convicting an innocent person.*

In our analysis, we reject, at the significance level of 3.13% (1 in 32), the hypothesis that the defendant did not discriminate against women in management positions and confirm, at the significance level of 3.13%, that the defendant did discriminate against women in management positions.

Similarly, we reject, at the significance level of 6% (1 in 17), the hypothesis that the defendant did not discriminate against management employees in higher age groups and confirm, at the significance level of 6%, that the defendant did discriminate against management employees in higher age groups.

The mathematical statistics has the useful quality of being able to recognize that in real life, the decisions are being made under the conditions of uncertainty. In other words, there is always a chance, small as we hope, that under the conditions of uncertainty the correct decision will be rejected in favor of the incorrect decision.

This is, for instance, why the Supreme Court decides by a majority decision, with a dissenting opinion representing the chance that a correct decision has been rejected in favor of an incorrect one. Similarly, in civil cases, the plaintiff must prove the case by preponderance of evidence, meaning that it is more

likely than not that the plaintiff's allegations are true. More likely than not means the probability of more than 50 (fifty) percent.

It is evident, that the deterministic descriptions of real life do not work as well. They allow only for two possible outcomes: Zero and one, or impossibility and certainty. This does work at the lowest levels of decision making, for instance, inside computers as a building block for a more complicated logic. But this concept does not work in real life situations. It would require, for instance, that the plaintiff prove the plaintiff's case with certainty, meaning with the probability of 100 (one-hundred) percent, which is an impossibility in itself.

Special Note

The elementary statistical methods used in this Appendix are well established. They have been used for a long time by the practitioners in Title VII and ADEA cases, and in the Government and the industry. Some of these methods have been known literally for hundreds of years. In this Appendix, an effort has been made to show the development of necessary formulas and provide a proof where practical. In addition, the mathematical concept of statistical significance as related to legal significance has been adopted by the Supreme Court in *Hazelwood* and in *Castaneda*.

It is therefore respectfully hoped that the Court will be able to rely on these court decisions and, if necessary, accord a judicial notice to the elementary methods employed in this Appendix. Expert testimony is readily available.

Appendix E

Olga Orisek
The Tudor
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White Plains, NY 10604

February 10, 1993

Mr. Geoff Worton BY FEDERAL EXPRESS
Director, User Services
American Institute of Aeronautics and Astronautics
Technical Information Division
555 West 57th Street
New York, NY 10019

Re: My performance appraisal dated 11/92, as discussed with me on 2/5/93 and related issues

Dear Geoff:

The purpose of this letter is to discuss my performance appraisal document, dated 11/92, and related issues. My performance appraisal was conducted only on 2/5/93. On that day, I saw for the first time the performance review document prepared by you in 11/92.

This means that I have gone without a performance appraisal for twenty one (21) months. My last performance appraisal took place in May 1991. This is in violation of the AIAA-TID policy promulgated in the Employee Handbook. I am entitled to have a performance appraisal at least annually.

You will recall that after we discused the items in the performance appraisal document prepared by you and you

asked me to sign it, I requested time to take it with me and study it before signing it. Upon reviewing the document after our meeting, I found to my complete surprise that on the last page you rated my overall performance as "unsatisfactory" - and important fact you did not discuss with me at all during my performance appraisal. This kind of approach to an employee performance appraisal is unacceptable by any standards.

I recognize that I should constantly strive for improvement and I am open to criticism aimed at improving my performance. My accomplishments are documented elsewhere. However, your assessment of my performance over the last twenty one months as unsatisfactory is indefensible in view of the fact that my previous performance during the preceding fifteen years, part of that in a management position, was consistently rated "above normal", "exceptional" or "excellent". This has been documented in my personnel file by my annual performance appraisals, including the last one that is dated May 1991.

Furthermore, I have been performing essentially the same duties since the inception of our computer system five years ago. And, as you know, we have been working under the direction of the same AIAA-TID Director Barbara Lawrence all this time.

In May 1991, an opening for the position of Manager in the AIAA-TID library was posted on our bulletin board. I applied for the position because I seemed to satisfy all the posted requirements of the position, particularly previous management experience at AIAA-TID, actual hands-on experience in the AIAA-TID library, foreign languages requirement, and scientific / technical / engineering / librarian

academic background. Not only that I was not seriously considered for the position, but my application, initiative, and readiness to assume responsibility are nowhere to be found in my personnel file. The position was filled with a young man from outside.

Over the two last years, I have witnessed AIAA-TID management personnel, who managed various departments in a profitable and successful manner for many years, as well as staff personnel with many years of successful service, being demoted or forced out. Invariably, these employees were foreign-born, older women that were replaced by American-born, young men. I am told that in all these cases the demotions took place after a sudden unsatisfactory performance appraisal that followed many years of good performance. Now, I am the one who has received an unexpected unsatisfactory performance appraisal and I am a fifty six year old, foreign-born woman. These events form a definite pattern that suggests deliberate discrimination based on age, sex and national origin.

Finally, I would like to make a few remarks on a more personal note: (1) After almost seventeen years of service, I strongly object to the treatment I received in connection with my recent request for five days of vacation immediately following the closing of our entire office at the end of the year. (2) since nobody has ever asked, apparently because of lack of interest, this seems to be an opportune time to point out that I have been successful also in other outside activities. Two years in a row, I was the Czechoslovak national champion in downhill skiing. Last year, at the age of fifty six, I captured the eighth place in the Sports Car Club of America Pro Rally National Championship Racing Series. (3) I have known

adversity and hardship - before coming to the United States, I was jailed for two years, based on fabricated political charges, by the Communist Government of Czechoslovakia (I have been exonerated in 1991 by the new democratic Government of Czechoslovakia). (4) As a manager, I have learned that by knowing my employees well, I could utilize their capabilities to the fullest. My former subordinates did not become my adversaries but my friends.

I am willing to discuss an acceptable settlement of the issues stated above in the presence of my counsel. However, if the management wishes to litigate these issues, I am prepared to proceed. I would appreciate your prompt attention to this letter.

Sincerely,

s/ Olga Orisek

cc: Ms. Barbara Lawrence, Director, AIAA-TID,
BY FEDERAL EXPRESS
Mr. David Quackenbush, Director - Human Resources,
AIAA, BY FEDERAL EXPRESS
Mr. Cort Durocher, Executive Director, AIAA,
BY FEDERAL EXPRESS

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Supreme Court, U.S.
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No. 98-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OLGA ORISEK,

Petitioner,

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent, American Institute of Aeronautics and Astronautics, a non-profit institution which has issued no shares to the public, states that it does not have any parent companies or any nonwholly owned subsidiaries.

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INTRODUCTION

Petitioner, Olga Orisek, seeks review of the Second Circuit's summary affirmance of the district court's detailed and thoughtful rejection, as a factual matter, of Petitioner's claim of age, gender and national origin discrimination when she was terminated along with 59 of the non-profit Respondent's 79 employees as a result of loss of its entire funding grant from NASA due to federal budget cutbacks. *See* App. 1a-17a, 18a-21a.[1] Petitioner does not contend that there is any conflict among the circuits with respect to any issue in the Petition, and she cannot demonstrate that the Petition raises any genuine issue of law. Rather, as the Second Circuit correctly determined, the district court applied the correct legal standards in rejecting, as unsupported by the factual record, the alleged circumstantial evidence claimed by Petitioner to support her case. Accordingly, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner claims that she was denied a promotion to a new position in May 1991 and laid off in May 1993 from her position as a Computer Support Analyst at the Respondent, American Institute of Aeronautics and Astronautics (the "Institute" or "AIAA"), because of discrimination by its 49-year-old, female, Director, Barbara Lawrence, based allegedly on Petitioner's age (then 56), gender (female) and national origin (Czech).

The Institute is a nonprofit organization whose New York branch office translates and publishes scientific abstracts and technical programs for the international aviation and

---

[1] "App." refers to pages of the Appendix to the Petition for a Writ of Certiorari ("Petition" or "Pet.").

aerospace community. For twenty five years, AIAA-NY was funded almost exclusively by National Aeronautics and Space Administration ("NASA") grants. In December, 1993, because of increasing federal cutbacks, NASA eliminated *all* grant support to AIAA-NY. The loss of this subsidy resulted in the layoff of 59 employees from a staff of 79, office relocation from a space of 27,000 square feet to a 4,000 square foot site, a massive consolidation of job responsibilities, and the loss and outsourcing of once-vital aspects of AIAA activity, including its microfiche and library divisions. App. 3a-5a.

Petitioner was one of almost thirty employees that the Institute was forced to lay off in 1993 alone, due to the loss of NASA funds. A significant number of older, female, foreign nationals were retained *after* Petitioner was dismissed in March: Elena Pomerantsev, age 54; Donka Georgieva, age 64; Lyudmila Krel, age 55; Blanca Nash, age 57; Aseneth Salamanca, age 65; Irene Skipski, age 67; and Faina Radomsky, age 56, and several *younger* American men were laid off around the same time as plaintiff: William Doherty, age 29; Danny Luce, age 43; Alan Shaw, age 44; and John Purdy, age 34. Nonetheless, Petitioner sued her former employer for alleged gender, age and national origin discrimination, following the Equal Employment Opportunity Commission's rejection of each of her claims on their merits. App. 3a-5a, 12a, 15a-17a.

Ms. Orisek's claims are based on two events: (i) her unsuccessful application in 1991 to become the Manager of AIAA's library division, and (ii) the Institute's shift in 1991 from a traditional management hierarchy to a lateral 'team' organization, which, she contends, led inexorably to her 1993 departure. The 1991 restructuring resulted in Ms. Orisek's assignment to a department which included financial support, marketing and computer support services, and managerial expectations that she would in fact perform the computer support and programming tasks set forth in her job description

and performance review goals of the preceding three years. App. 2a-17a.

After the reorganization, however, Petitioner did not use, develop or apply her computer programming skills in a cost-effective fashion. Instead, Ms. Orisek relied on an outside consultant to perform many of her basic job functions and tasks. When the Institute was confronted with fiscal disaster due to the loss of NASA funds in 1993, its department managers were forced to address budgetary restrictions by reviewing staff members to identify the weakest performers. In May 1993, Petitioner was selected for layoff. App. 2a-17a.

This action followed. After completion of the discovery period set by the district court, the Institute filed for summary judgment on the grounds that Petitioner could not demonstrate a prima facie case of discrimination, or that the reason for her 1993 layoff was a pretext for discrimination. App. 2a-3a.

In granting the Institute's motion for summary judgment, the district court assumed for the purpose of the motion that Petitioner's circumstantial evidence met her threshold burden of proving a prima facie case, and placed the onus on the Institute to articulate legitimate non-discriminatory reasons for her dismissal. The district court then found that no discrimination occurred during the Institute's company-wide work force reductions, that "several female foreign nationals of the same age as Petitioner were retained" after she was laid off, and that the decision to dismiss Petitioner was based on work performance problems unrelated to her age, gender or national origin. The district court examined in depth each and every argument raised by Petitioner and determined that no direct or circumstantial evidence existed from which a rational trier of fact could infer that the layoff decision was motivated by discriminatory animus. App. 2a-17a.

The district court also discussed at length the reasons for the Institute's 1991 decision to select another applicant to manage its library, finding that Petitioner's speculation as to why she was not chosen for the position did not support her claim that the Institute's program of downsizing and restructuring was a pretext for discriminatory behavior. The district court therefore appropriately granted summary judgment, and dismissed the complaint. App. 6a-7a, 12a-14a.

The Second Circuit affirmed the judgment of the district court, specifically determining that the district court had applied "the correct legal standards," and that "for substantially the reasons stated by the district court" there were no genuine issues of material fact in dispute which warranted reversal of the judgment in the district court. App. 18a-21a.

REASONS THE WRIT SHOULD BE DENIED

The factually-specific result below, fully explained by the district court's detailed review of the factual record and its analysis of each and every factual and legal assertion of Petitioner, raises no legal issues of any kind. App. 1a-17a. Rather, as specifically and correctly determined by the Second Circuit, the district court found that "under the correct legal standards" Petitioner could not prove that Respondent's stated reason for adverse employment action was merely a pretext for discrimination. App. 19a-21a, at 20a. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.

While Petitioner stresses at length the importance of anti-discrimination legislation, a proposition Respondent certainly does not disagree with, each of Petitioner's assertions of a legal issue depend entirely on acceptance of the "circumstantial evidence" she argues she proffered in the district court. However, the district court's extensive quotation from

the undisputed documents in the factual record demonstrated conclusively that, at best, Petitioner's claims were surmise. *See e.g.*, App. 7a-17a.

Thus, the Petition raises no issues of law with respect to the application of the standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Rather, the undisputed documentary record below neither supported the "circumstantial evidence" Petitioner wrongly argues she presented, nor any other factual basis to sustain her claims. Respondent's retention of Elena Pomerantsev, age 54; Donka Georgieva, age 64; Lyudmila Krel, age 55; Blanca Nash, age 57; Aseneth Salamanca, age 65; Irene Skipski, age 67; and Faina Radomsky, age 56, all foreign-born employees, and Respondent's layoff of several *younger* American men, including William Doherty, age 29; Danny Luce, age 43; Alan Shaw, age 44; and John Purdy, age 34, belie any discrimination during the economically-compelled drastic reduction in force that followed, necessarily, Respondent's loss of its entire funding grant. The district court, however, went far beyond just those dispositive facts, and discussed in detail each and every assertion made by Petitioner and the uncontested factual record's inability to support those assertions. *See e.g.*, App. 7a-17a.

Thus, there is simply no reason warranting grant of the Petition. Petitioner's inability to support her case below was due to a failure of proof, not any misapplication of law or any other reason implicating the broad and recurring impact necessary to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: March 8, 1999.

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No. 98-1252

In The

Supreme Court of the United States

OCTOBER TERM, 1998

OLGA ORISEK,

Petitioner,

v.

AMERICAN INSTITUTE OF AERONAUTICS AND ASTRONAUTICS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent, in the Introduction to its Brief in Opposition, erroneously re-states and minimizes Petitioner's case by saying: "Petitioner, Olga Orisek, seeks review of the decisions of the courts below after the courts below rejected Petitioner's claim of age, gender and national origin discrimination when Petitioner was terminated along with 59 of the non-profit Respondent's 79 employees as a result of loss of its entire funding grant from NASA due to federal budget cutbacks." This merely demonstrates, as further detailed below, the familiar pattern of half-truths and deliberate misrepresentations that has permeated Respondent's handling of this case since its inception in 1993.

In the same vein, Respondent's Introduction insists that "Petitioner does not contend that there is any conflict among the circuits with respect to any issue in the Petition....". This demonstrates the kind of Respondent's faulty legal analysis which the district court previously thought it necessary to use verbatim in its decision. This is because this matter is worse than the one alluded to by Respondent: There is a repeated conflict *within* the Second Circuit between the decision made by the Second Circuit in Petitioner's case and in the case of *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2nd Cir. 1990). *See* Petition at 9 and 18.

Similarly, Respondent's Introduction refers to "the alleged circumstantial evidence claimed by Petitioner to support her case, ... as unsupported by the factual record." First, the doctrine and proof pattern established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) specifically envisions circumstantial evidence. Second, Petitioner submitted a body of circumstantial evidence that

cumulatively undercuts the credibility of Respondent's proffered reasons for its employment action. Thus, Petitioner showed that Respondent's proffered reasons are not worthy of credence and, therefore, are a sham to hide the true, impermissible, discriminatory reasons for Respondent's employment action. The more glaring examples, well supported by the factual record contrary to Respondent's statement above, are the uncontested evidence of fraudulent job description used by Respondent to bolster its claims (*See* Petition at 14) and the use, as evidence, a 15-year old Petitioner's resume in an attempt to fraudulently minimize Petitioner's qualifications and experience (*See* Petition at 12).

Among other things, Petitioner also showed that, in spite of budget cuts, Respondent's need for somebody of Petitioner's qualifications continued after Petitioner's discharge and that Respondent made attempts to replace petitioner with persons of similar qualifications but from a class of employees not protected under TITLE VII and ADEA (*See* Petition at 16); that one month before Petitioner's discharge, Respondent wrote in Petitioner's job performance review "[her] role is critical for TID's future" ....."Olga, as our Systems Guru" ..... "this is a critical position within TID" (See Petition at 16); and that, when Respondent refused to hire Petitioner for the position of Library Manager, Respondent hired a 33 year old American male, an applicant from a class of employees not protected under TITLE VII and ADEA, that Petitioner was better qualified than the chosen applicant and that Respondent purposely "relaxed" the posted requirements of the position in order to hire the less qualified applicant (*See* Petition at 10); that Respondent gave Petitioner no performance reviews for almost two years prior to Petitioner's discharge and that by not reviewing Petitioner's performance nor giving her performance warnings, Respondent demonstrably denied Petitioner the opportunity to improve (assuming that such improvement was

necessary), the opportunity that was given to all other employees either through annual job performance reviews or through performance warnings (*See* Petition at 14); that Petitioner, during the last two years before Petitioner's discharge, had significant work accomplishments resulting in substantial documented savings to Respondent's organization (*See* Petition at 15).

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Respondent's listing of employees who were individually retained or laid off is immaterial. Petitioner presented a mathematical statistics analysis of Respondent's employment practices. The analysis shows that after 1991, Respondent systematically discriminated against foreign-born, older employees and particularly against women in what cannot be described in any way other than "American male youth movement". The analysis was prepared according to standards set in *Castaneda v. Partida*, 430 U.S. 482 (1977), *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See* Petition at 5, 16 and 17.

Respondent states that the Equal Employment Opportunity Commission rejected Petitioner's claims on their merits. It is not so: The Commission specifically stated that it made no determination of culpability and issued the Notice of the Right to Sue in September 1995. *See* Petition at 2.

Respondent's claim that "the Institute's shift in 1991 from a traditional management hierarchy to a lateral 'team' organization, which she contends, led inexorably to her 1993 departure" is erroneous. Petitioner never made such contention.

Respondent again repeats its contention, previously refuted by Petitioner, that one reason for Petitioner's allegedly unsatisfactory performance was Petitioner's reliance on an outside contractor - computer programmer. This Respondent's contention is not worthy of credence for a simple reason - the evidence shows that Respondent started this practice in 1982, long before Petitioner's appointment to the position of Operations Computer Support Analyst, and has continued this practice for several years after Petitioner's discharge. *See* Petition at 15.

The decision by the courts below, restated by Respondent, is specifically the subject of this petition and it is therefore not a refutation of this Petition.

Respondent states that "The district court also discussed at length the reasons for Institute's 1991 decision to select another applicant to manage its library, finding that Petitioner's speculation as to why she was not chosen for the position did not support her claim that the Institute's program of downsizing and restructuring was a pretext for discriminatory behavior." This Respondent's statement is nonsensical and should be disregarded in its entirety. First, Petitioner has never made such claim with respect to Respondent's refusal to hire Petitioner for the position of Library Manager. This is because the Respondent's refusal to hire Petitioner for the position of Library Manager in 1991 and the inception of downsizing in 1993 were almost two years apart. *See* Petition at 10 and 11. Second, the district court has never made such finding.

RESPONDENT'S REASONS THE WRIT SHOULD BE DENIED

Respondent's reasons are disingenuous, erroneous and

have no basis in the law.

The legal issues raised in the petition, the existence of which is denied by Respondent, are as follows:

The district court abused its discretion when it denied Petitioner's request seeking information about circumstances under which certain employees protected under TITLE VII and ADEA statutes left Respondent's employ (*See* Petition at 3 and 18). The Second Circuit's affirmation is in conflict with its earlier similar decision in *Hollander* (*See* Petition at 18). There is an obvious fallacy in the Respondent's claim that no conflict among the circuits is even alleged: There is a conflict *within* the Second Circuit.

The district court went awry in interpreting the *prima facie* case and the shifting of evidentiary burden under the *McDonnell Douglas* doctrine and proof pattern as clarified in *Burdine*. *See* Petition at 3 and 7-10, Appendix at 40a-48a. The Second Circuit's affirmation is in conflict with its earlier similar decision in *Hollander*. *See* Petition at 9-10, Appendix at 40a-48a.

The district court erroneously failed to apply the *McDonnell Douglas* test prescribed for TITLE VII and ADEA cases, to the matter of Respondent's refusal to hire Petitioner for the position of Library Manager in May 1991. *See* Petition at 3 and 12.

In the matter of Petitioner's discharge by respondent in March 1993, the district court's refusal to rule on the sufficiency of Petitioner's *prima facie* case notwithstanding, Petitioner submitted overwhelming circumstantial evidence that sufficiently establishes Petitioner's *prima facie* case; just on these grounds, the district court's decision to grant the

summary judgment for Respondent is erroneous and should have been reversed as a matter of law. *See* Petition at 3 and 7-10, Appendix at 40a-48a. The Second Circuit's affirmation is in conflict with its earlier similar decision in *Hollander*. *See* Petition at 9-10, Appendix at 40a-48a.

Petitioner offered overwhelming circumstantial evidence, as envisioned by the *McDonnell Douglas* doctrine and proof pattern, showing that Respondent's proffered non-discriminatory reasons for its employment action are unworthy of credence and were therefore a sham to hide the true, impermissible, discriminatory reasons. *See* Petition at 4-19. Respondent appears to be erroneously denigrating the worth of circumstantial evidence in general and, in respondent's case, its support by factual record. On the first issue, Respondent is wrong in that the *McDonnell Douglas* doctrine and proof pattern provides an orderly method for proving discrimination in TITLE VII and ADEA cases solely on the basis of circumstantial evidence - an approach taken by Petitioner - as it is a well established fact that these cases must be frequently tried solely on the basis of circumstantial evidence. *See* Appendix at 40a-48a.

On the second issue, given the fact that Petitioner undertook to show that Respondent's proffered non-discriminatory reasons are not worthy of credence, it is disingenuous for Respondent to claim lack of factual record when Petitioner furnished uncontested evidence showing that Respondent engaged in actions such as, for instance, submitting into evidence a fraudulent job description, aimed at bolstering Respondent's claims, that, by Respondent's own admission, was previously fraudulently used in evaluating Petitioner's job performance.

CONCLUSION

For these reasons, the Petition for the Writ of Certiorari should be granted.

Date: March 17, 1999

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